DOCUMENT RESUME

ED 164 685 UD 018 941

AUTHOR Nelson, Helen E.
TITLE How State and Local Governments Regulate Economic Activities: A Consumer Briefing.
INSTITUTION Wisconsin Univ., Milwaukee. Center for Consumer Affairs.
SPONS AGENCY Office of Education (DHEW), Washington, D.C.
PUB DATE May 78
NOTE 79p.; Not available in hard copy due to reproduction quality of the original document
AVAILABLE FROM Materials Request Desk Office of Consumers' Education, Room 5624, ROB-3, U.S. Office of Education, Washington, D.C. 20202 (Single copies available free while supply lasts)

EDRS PRICE MF-$0.83 Plus Postage. HC Not Available from EDRS.
DESCRIPTORS Banking; Community Role; *Consumer Economics; *Consumer Protection; *Government Role; Insurance Companies; *Local Government; Marketing; *Political Power; Public Health; *State Government; State Legislation; Utilities

ABSTRACT

This paper depicts some of the ways State and local governments define, regulate, and police the communities and markets where consumers convert their income into a way of life. Explained are how regulatory processes are developed in State and local government, what the underlying concepts are, and some of the access points for fruitful citizen participation. Some of the topics discussed in terms of State and/or local government control and/or influence include real property sales, consumer credit laws, lending and debt collection agencies, public utilities, insurance, public health, occupational licensing, consumer rights, and consumer protection. Also included is a list of recommended reading. (Author/EB)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

DEC 11 1978

UD

HOW STATE AND LOCAL GOVERNMENTS REGULATE ECONOMIC ACTIVITIES

A Consumer Briefing

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION

THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

ED164685

UD018941

The activity which is the subject of this report was supported in whole or in part by the Office of Education, U.S. Department of Health, Education, and Welfare. However, the opinions expressed herein do not necessarily reflect the position of the Office of Education, and no official endorsement by the Office of Education should be inferred.

Single copies available free while the supply lasts from Materials Request Desk, Office of Consumers' Education, Room 5624, ROB-3, U.S. Office of Education, Washington, DC 20202. No bulk orders can be filled.

HOW STATE AND LOCAL GOVERNMENTS REGULATE ECONOMIC ACTIVITIES

A CONSUMER BRIEFING

By
Helen E. Nelson
Professor of Economics

The Center for Consumer Affairs
University of Wisconsin-Extension
929 North Sixth Street
Milwaukee, Wisconsin 53203

May 1978

UDO 18941

TABLE OF CONTENTS

PREFACE 1

PART I ONE HUNDRED YEARS OF STATE GOVERNMENT BEFORE 1775 3

The State—Successor to the King 3

The Common Law—Valuable Heritage from England 4

State Interference in the Economy Began More Than 300 Years Ago 5

PART II STATES DEFINE WHO OWNS WHAT AND WHO OWES WHOM 11

The Transfer of Property Rights 11

Real Property 11

Surveillance over Real Estate Brokers Is the Primary Form of State Regulation of Real Property Sales 12

Consumer Representation on Real Estate Boards 14

Real Estate Sales across State Lines—a Consumer Sales Scandal 14

Tenant Rights to Use of Rented Real Estate 15

Personal Property 16

State Consumer Credit Laws Bear Directly on Personal Property Rights 16

Consumer Credit Laws Govern Many of the Conditions under Which Personal Property Is Bought and Sold 18

Multiple Regulatory Agencies Administer Consumer Credit Laws 19

Opposing Efforts to Rewrite and Consolidate State Consumer Credit Laws 20

The Uniform Consumer Credit Code 20

The Consumer Counterproposal 20

State Chartering and Licensing of Lenders and Debt Collection Agencies 21

Federal Entry into Regulation of Consumer Credit Practices 22

Summary 22

PART III LITIGATION AS REGULATION 25

Class Action 28

PART IV USE OF POLICE POWER TO REGULATE BUSINESS VESTED WITH THE PUBLIC INTEREST 31

The State Chartering of Corporations 31

Public Utilities 33

Categories of Chartered Public Utilities by Function 35

Public Utility Concepts 36

General Chartered Corporations Vested with a Public Interest 38

Insurance 44

Early History 44

Rise of State Insurance Commissioner's Office 45

Insurance Uniquely Held to be Not Commerce between the States 45

Two Hundred Years of Exclusive State Jurisdiction 46

Congressional Rejection of Jurisdiction 47

Some Commissioners Hear Consumer Voice 48

PART V USE OF THE POLICE POWER TO PROTECT THE PUBLIC HEALTH AND SAFETY 51

Public Health 51

City and County Public Health Departments 51

Milk—a Special Focus of Public Health Officials 52

Change in Services of Local Public Health Agencies 53

Can Consumers Participate in Health Care Planning on the State and Local Level? 55

Preventive Health Care for Youngsters from Low Income Families 56

Health Maintenance Organizations 56

Health Service Agencies 56

Occupational Licensing 57

PART VI USE OF THE POLICE POWER TO MAINTAIN LAW AND ORDER IN THE MARKETPLACE 65

PART VII CONCLUSION 71

RECOMMENDED READING 73

PREFACE

We often hear the federal government in our country referred to simply as "the government." When we speak of "the government," we are typically taken to be talking about the federal government: Congress, the President, the Internal Revenue Service, the Food and Drug Administration, the Pentagon, and other federal institutions; in short, Washington, D.C. Consumer representatives, no less than others, fall victim to this stereotype.

There are many reasons why this is so. It is the President of the United States and his pronouncements which are relayed to us on the nightly television news. The media are essentially national, and even local media depend on national newswire services for much of their news. It is far simpler for the media to report to the nation on what happens in Washington than on what occurs in fifty state capitals. One can easily come to believe that Washington determines all public policy and that it is only from here that government serves or disserves consumers.

There are major limitations to the power of the federal government to solve problems even when solutions seem evident. Consider these examples of the limited reach of our national government and the possible impact on consumers:

A product manufactured in Los Angeles could be banned by the FDA from entering into interstate commerce. Yet, the manufacturer could still unload the banned product on any of California's 22 million consumers unless California law and its enforcement is equal to or better than FDA regulations which led to the ban on interstate shipment.

Florida green produce growers must meet Environmental Protection Agency pesticide residue standards to ship their crop across state lines to New York, but New Yorkers vacationing in Miami Beach are dependent on Florida state law and its enforcement for protection from excessive pesticide residues on Florida grown produce while they are in Florida.

Congress determines—as yet—the price of natural gas at the wellhead if it goes into an interstate pipeline. State and sometimes even local governments determine the price consumers pay for natural gas in their homes.

Unfortunately, it is too often forgotten that our Constitution reserves for the states all powers not specifically granted to the national government. The powers remaining with the states under the Tenth Amendment are far more numerous than those granted the federal government.

This paper depicts some of the ways state and local governments define, regulate, and police the communities and markets where consumers convert their income into a way of life.

It attempts to explain how the regulatory process developed in state and local government, what the underlying concepts are, and some of the access points for fruitful citizen participation. It is intended as an orientation, not as a definitive guidebook.

This paper was written under Contract No. P00770639 between the Office of Consumer Education, U.S. Department of Health, Education and Welfare and the Center for Consumer Affairs, University of Wisconsin-Extension with the very considerable assistance of Gerald M. Becker, Research Specialist. Angela Schreindl produced the camera-ready manuscript.

I am grateful to Barbara Gregg, Mary Gardiner Jones, and Kathleen O'Reilly for reading a first draft and to Dustin Wilson for the idea.

Hopefully, it will encourage consumer groups to participate in public policy formation at every level of government and help them to get the satisfaction of more direct participation than is usually possible at the federal level.

PART I

ONE HUNDRED YEARS OF STATE GOVERNMENT BEFORE 1776

THE STATE—SUCCESSOR TO THE KING

Nothing brings home the power of state and local government like buying a piece of property.

Where is the deed recorded? At the county courthouse.

If there arises any dispute over ownership which cannot be resolved between the parties, where is that dispute decided? In the civil division of the court at the county courthouse.

How can you lose ownership of your property? The state is empowered to seize your property if you fail to pay taxes. Moreover, the state, and local governments empowered by the state can force you to give up your property, with compensation, for a public use through their *right of eminent domain.*

It is also the state, through its subdivisions, the counties, townships, and parishes, that enforces your right to will your property, and to sell it, and the right of your heirs to inherit it in the absence of a will.

Since the United States was a part of England for a century and a half, and since the original states were grants of land from the King of England, we were governed in the early period of colonization by English law and custom. The original states, having been granted an area of land in the new world, were desirous of granting, in turn, land to settlers. It was English law and custom which governed the process.

It is the *fee simple* land transfer of English law which was introduced during the century and a half we were colonies of England that underlies our property owner's rights today. With the state succeeding to the role of the king as ultimate donor and with the right still to appropriate one's land under specified circumstances, real estate is sold in fee simple. The seller vacates, the buyer assumes control.

Jonathan R. T. Hughes, an economist at Northwestern University, concludes:

> The contribution of this property system to American development was immense; one need only consider the Russian failure to solve their land problems among individuals or the land tenure problems in all countries settled by the Spanish. With the addition of Jefferson's survey system in the Northwest Ordinance of 1785, the way was open to divide, own, sell, and invest in a continent and in islands in the Pacific. It was an institutional machine for peaceful settlement, the like of which the world has never seen.[1]

In summary, in the capitalist society of the United States; it has evolved that it is the states which confer, uphold, and adjudicate private property rights, large and small.

THE COMMON LAW—VALUABLE HERITAGE FROM ENGLAND

Another precious and fundamental inheritance from our English background is the concept of the *common law*. This is the practice of determining rights by the weight of evidence and argument, then using cases thus decided as precedents to determining rights in later cases. It is frequently referred to as *case law*, and is fundamentally different from *statutory law*, or law passed by legislatures over which the people in a democratic society have far more direct control.

Arguments in the practice of determining rights by common law evolved the concept of the *reasonable man*. In the absence of specific statutory prescription, the judge or the magistrate was encouraged to consider whether a reasonable man would have acted, trusted, or believed as did one of the parties to the dispute.

In the areas of product performance and advertising, many disputes today continue to be resolved in the common law tradition. The manufacturer's attorney may argue that a reasonable man should have been able to follow directions and use the product without injuring himself. Therefore, his client should not be liable for danger arising from careless use of products or failure to read or understand instructions. Or, if the consumer followed the instructions and still was injured, his attorney might argue that he was acting on a reasonable assumption and the judge should hold the seller liable.

Warranty law has mostly evolved through common law decisions rendered by the courts. Instead of legislatures enacting laws

---

[1]Jonathan R. T. Hughes, *The Governmental Habit* (New York: Basic Books, 1977); p. 21.

specifying what a warranty must provide, centuries of common law cases decided on contract concepts have given us our warranty law.

Now there is widespread effort on the part of both consumer leaders and sellers to replace common law warranties with statutory warranty law. A statute, once passed, gives new guidance to the judges and magistrates. It can *codify* the case law that has been generated by court decisions in the past or it can change it. A statute can cut off some of the avenues of consumer recourse against the seller or it can increase them. Whatever is the will of the legislature, the courts must follow it. Statutory law can be used either to enlarge consumer rights or to place more onerous restrictions on them than have evolved through the courts in civil law cases.

Consumer attorneys complain that some recently enacted state warranty acts have the effect of lessening established common law liability of the seller, and hence benefit sellers more than consumers.

On the other hand, the outcry from some in the medical profession and the health care and insurance industries for legislation on malpractice insurance arises from what is perceived as a recent trend in civil court decisions of fixing strict liability on the health care industry for alleged patient injury.

Thus consumer leaders must scrutinize both common law and statutory laws for a sense of their likely or known effect on consumer rights. Similarly, they must determine whether the urgent campaign by manufacturers for product liability insurance legislation represents an effort to abridge by statute consumer rights now existing in the common law.

The common law has given us an access to justice in the absence of statutory law. It continues to give real consumer protection, especially in the area of *torts*, or injuries done one by another.

STATE INTERFERENCE IN THE ECONOMY BEGAN MORE THAN 300 YEARS AGO

A myth widely perpetuated is that government interference in the United States economy began in the depression of the 30s when Franklin D. Roosevelt became president. Actually, interference began long before George Washington was president. The original states during their time as British colonies used their power—and it was the power of seventeenth century kings—to do what was deemed necessary, wise, or merely advantageous to the orderly transfer of goods, as well as for the prosperous settlement of the large area of their land grant.

The charter that King Charles I of England gave the Massachusetts Bay Colony in 1629 authorized the General Court of the colony,

the legislative body, to make "all Manner of wholesome and reasonable Orders, Lawes, Statutes, Ordinances, Direccons, and Instruccons" so long as they were "not contraire to the Lawes of this Realme of England." The members of the court of the colony did that, and by 1648 the *Book of General Lawes and Liberties* governing Massachusetts Bay Colony was published. At that time, it became legal to employ paid attorneys.

Pennsylvania followed soon after. King Charles II gave William Penn the charter for his colony in 1681. The following year the colony was founded, and Penn issued his *Frame of Government for Pennsylvania.*

In Virginia, according to historian Daniel J. Boorstin,

> most of the families which were to rule Virginia later in the century . . . had laid the foundations of their fortunes in vast land grants acquired before 1700.[2]

He observes:

> The motives and patterns of action which were to reach a climax in the Revolution were already taking form a century before in the daily life of Virginia . . . [T]he House of Burgesses . . . was hardly more than the political workshop of a ruling aristocracy. Here were made the major decisions about the price and quality of tobacco, taxation, education, Indian relations, and religion.[3]
>
> Land—land to use, to waste, to divide among one's children—was the foundation of all the governing families and the fortunes of Virginia. The power to give or to deny land, those vast virgin tracts expected to appreciate most in the next decades, rested in the hands of the government, especially in the House of Burgesses and the Governor's Council.[4]

Putting it even more plainly, Boorstin observes:

> To satisfy land hunger in Virginia, one needed not only a strong body but a shrewd political sense. The pathway to landed wealth lay, not only through uncharted tracts in the wilderness, but also through the corridors

---

[2]Daniel J. Boorstin, *The Americans : The Colonial Experience* (New York: Vintage Books, 1958); p. 103.

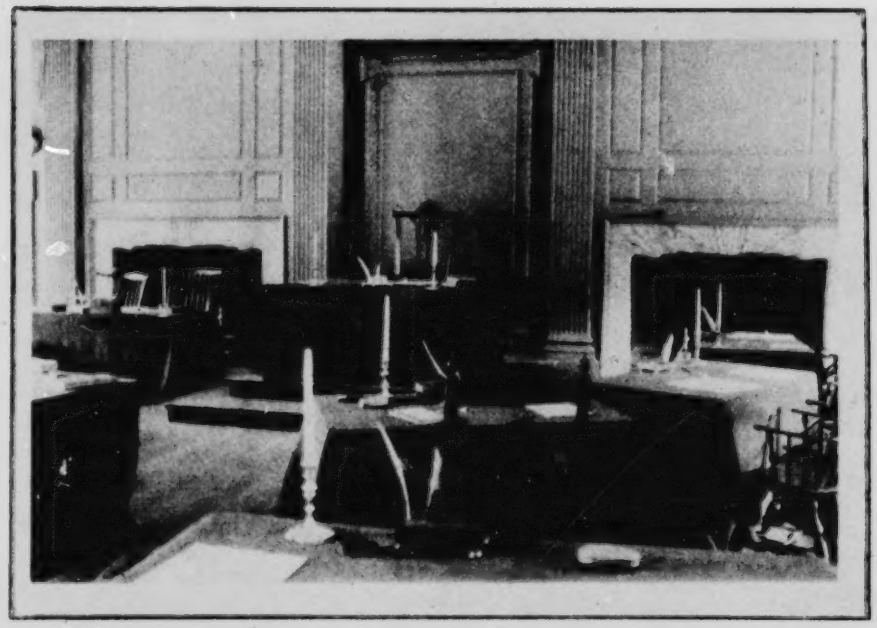
[3]Boorstin, pp. 110-11.

[4]Boorstin, p. 119.

of government buildings in Williamsburg. This was the "inside track," well-worn by leading Virginians, to the fertile expanses of the unsettled south and west. There was hardly a fortune in Virginia which had not been sought out in this fashion.[5]

Tobacco growing was the profit-making enterprise to which the land was put in Virginia. Boorstin tells us that, according to some historians, the plantation system of the colonial period in Virginia and the West Indies was "the first great experiment in large-scale commercial agriculture since the Roman Empire."[6]

Independence Hall, built as the Pennsylvania State House, originally quartered the three branches of colonial government in that province. The assembly room, later the site of the signing of the Declaration of Independence and the drafting of the United States Constitution, was first occupied by the provincial assembly in 1735.



Assembly chamber of Pennsylvania State House[7]

---

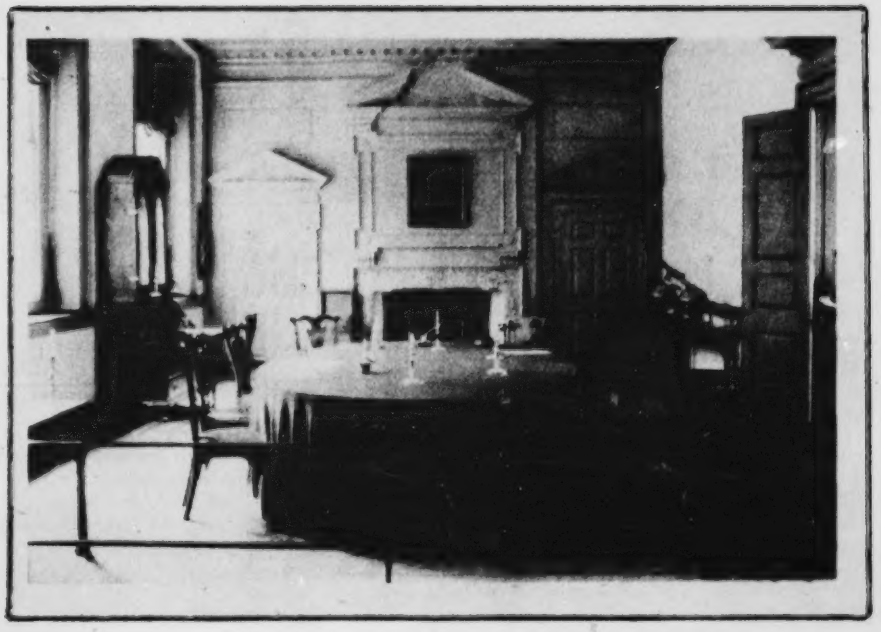
[5]Boorstin, pp. 120-21.

[6]Boorstin, p. 108.

[7]Photographs by Gerald M. Becker.

Across the hall from the assembly room is what was once the Pennsylvania Supreme Court. Colonial judges in white wigs and scarlet robes not only heard the criminal trials of murderers, burglars, counterfeiters, and rapists but settled civil suits over land ownership, damage to property, and failure to pay a debt. The Governor's Provincial Council chamber was located on the second floor.

Pennsylvania Supreme Court



Governor's Provincial Council Chamber

Among the Pennsylvania laws "Establisht by the authority of his Majesties Letters patents, granted to his Royall Highnes James Duke of Yorke and Albany" was one regulating the retail sale of wine, beer, ale, and strong water. This government regulating activity is still carried on very similarly today.

THE WASHINGTON STAR MARCH 2,1978

Rejection of Liquor Store Next to Gas Station Upset

By David Pike
Washington Star Staff Writer

The D.C. Cou
overturned a ruli
holic Beverage C
ing a liquor licen
who wanted to re
to a gas station.

The board had
on grounds that
"drink-and-drive

In an unusual
given the board
the license tran
granted instead
back for reconsi
indicated it was
the board's "abri
conduct" that h
case for more tha

The decision y
judge appellate p
of many rulings
the proposed mov
uors from 2818 1
14th St.

JAMESON'S H
years at 2818 14th
when the propert
D.C. Redevelopm
for public use.

After the force
asked the ABC Bo
to move a block
where it could l

fect, the store owners appealed to the court in September 1976.

DUKE OF YORKE'S LAWS SEPTEMBER 22,1676

Inn keepers & Ordinaryes.

Keepers of inns and eating-houses, to have certificate of good behavior.

No Person or Persons shall at any time under any pretence or Colour whatsoever undertake to be a Common Victuler keeper of A Cookes shopp, or House of Common entertainment, or publique Seller of wine Beare, Ale or strong waters by retail or a less quantity than a quarter Caske, without a Certificate of his good behaviour from the Constable and two Overseers at least of the parish wherein he dwelt and a

And be licensed.

Lycence first obtained under the hand of two Justices of the peace in the Sessions upon pain of forfeiting five pounds for every such offence, or Imprisonment at the discretion of the Court.

To keep a sign.

Every Person so licenced for Common entertainment shall have some Ordinary signe obv
within three Months after t
penalty of twenty Shillings.

To be provided with wholesome beer.

Every Person Licenced to
be provided of strong and wh
malt, at the least to a Hoggsl
above two pence the quart un
lings, for the first Offence, fort
loss of his Licence. It is perr

Sale of same.

of Doores at a peny the Ale q

Punishment for permitting excessive drinking, &c

No Licenced Person shall s
or at unseasonable hours after
or about any their houses upo
pence for every Offence if C
thereof.

For not notifying

If any quarrel or disorder

THE WASHINGTON STAR
MARCH 2,1978

Arguing Over Beer Sales

Owners of liquor stores are battling the large supermarket chains to keep beer and wine off supermarket shelves.

"Our purpose here is to protect ourselves," said Lawrence Molloy, owner of a liquor store in Columbia and member of the Maryland State Licensed Beverage Association. "It's no question, with large chains and supermarkets, we can't compete."

Regulating the retail sale of liquor, 1676/1978

PART II

STATES DEFINE WHO OWNS WHAT AND WHO OWES WHOM

THE TRANSFER OF PROPERTY RIGHTS

Since colonial days, the states have made the laws establishing ownership of property and are still the ultimate arbiter of these laws.

The rules of establishing and transferring ownership differ according to whether property is real property or personal property. *Real property* is land and anything attached to it, such as a tree or a house. *Personal property* is everything else—boats, cars, furniture, jewelry, and stocks and bonds—any property which is not attached to the land.

Real Property

Not only do the states make laws governing the "conveyance" of real property from seller to buyer, but they provide the service through their local subdivisions of government of recording the owner's deed to his real property in the county or township offices "so that all men may know."

These land ownership records, together with wills and legal proceedings also on file, form the basis on which an abstract of title can be prepared for the seller to present to the buyer to establish clear title of ownership.

In most states today, either the state or the local government must approve new subdivisions before construction is commenced. Likewise, it is state law that establishes the boundaries of landlord-tenant agreements. Consumer groups are currently trying to update these state laws to define more adequately the consumer rights of renters.

Land ownership has always been encouraged in this country. State governments in the early years of their statehood took some care not only to maintain records of ownership and transfer but also to prevent the swindling of new settlers in bogus land sales. Requiring approval of subdivisions prior to their construction is the modern day outgrowth of these earlier concerns. State attorney

generals can and do invoke the laws against fraud and prosecute the swindler and false advertiser; but these actions come, of course, only after the misdeed is done and complaints are voiced. Seldom, even when prosecution is successful, is the consumer victim *made whole*. They rarely get their money back.

Surveillance over Real Estate Brokers Is the Primary Form of State Regulation of Real Property Sales

Now, the primary form of state regulation of real property sales is the screening, qualifying, and maintaining of surveillance over the persons who make a business of finding buyers for real estate the owner wishes to sell. Every state has a Real Estate Commission, a Department of Real Estate, a Real Estate Licensing Board, or some equivalent agency backed by a law making it illegal to engage in selling properties or to bring buyer and seller together for purposes of making a sale without being properly licensed by the state regulatory agency.

The occupational licensing and surveillance of real estate brokers and salespersons is the expression of society's interest in the legal and orderly transfer of land ownership. Typically, in order to be licensed applicants must pass a written examination and submit sufficient evidence of reliability and trustworthiness. Two licenses are issued: broker and salesperson. Salespersons must work under the supervision of a broker. Licenses can be revoked or suspended after a hearing.

Because the broker is the focus of society's regulation for the transfer of land ownership, many states reinforce their authority by prohibiting landowners from subdividing and selling their own land without a broker's services. Thus, the state can exact accountability from the broker that it cannot exact from the landowner.

Some states, California for one, require plans for a subdivision to be submitted to the Department of Real Estate along with sales materials and brochures before any sales are made. That state also places a disclosure requirement upon subdivision brokers. The prospective purchaser must be given a subdivision report setting forth facts on such consumer concerns as school facilities, taxes, water resources, and earthquake faults.

The real estate licensing agency is usually supported by license fees paid by the brokers and salespersons, that is by *user taxes* instead of general taxes. In more and more states, additional assessments are levied for a special educational and research fund. These funds are devoted to educational programs for licensees, to research

conducted at one of the state's universities, and to publications. A few states require licensees to take a minimum number of hours of prescribed education each year so that they may continue to be licensed.

Where real estate transactions are concerned, state legislatures have wrestled with the problem of the state's responsibility to the consumer victim of wrongdoing by one of the state's licensees. Because the amount of money involved can be substantially more than in most purchases and perhaps because consumer victims of real estate swindles may be well-to-do members of the community, more concern has been given to redressing the consumer's loss from a misrepresented real estate transaction than from most other consumer transactions.

One approach taken is to require each broker to post a $10,000 bond which could be used to redress the loss a buyer suffered from the broker's culpability. Another approach is that the legislature establishes a special fund from which the real estate surveillance agency may recompense victims of real estate brokers' malpractices.

It should not pass unnoticed that such measures also benefit the cheating broker by limiting liability or transferring that potential liability.

In Kentucky, for example, the education fund and the consumer recovery fund are combined into the Real Estate Education, Research, and Recovery Fund; usually referred to simply as the Recovery Fund. The Commission is required to maintain a minimum balance of $200,000 "for recovery and guarantee purposes." The amount an aggrieved consumer may receive is limited to $10,000 against any one licensee and can be awarded by the Commission after a formal hearing. The fund has been used to develop real estate courses in nineteen public colleges and universities, to establish chairs of real estate at several colleges, and to sponsor continuing education activities.

In California, 5 percent of all license fees is set aside to finance awards to consumers who suffer a financial loss and obtain a fraud judgment. Awards are limited to $10,000 per occurrence and $40,000 per licensee. From the time the fund was created in 1964 through January 1978, awards have totalled $1,627,270; an average over the thirteen years of about $125,000 annually. This annual payment is about the going price for a single-family dwelling in many California communities.

Utah's Real Estate Recovery Fund Act became effective January 1, 1976, with a maximum recoverable amount of $6,000. The consumer victim must obtain a final judgment in court against the real estate broker or salesperson before filing a claim. According to a spokesperson for the Board of Real Estate Examiners of Utah, no claim

has yet been filed. The spokesperson offered as a possible explanation that few lawyers and consumers know the right exists. The fund has now accumulated and segregated for claims of recovery the legal limit of $60,000 and is using the annual fees required of brokers and salespersons by the Real Estate Recovery Act for "advancement of education and research in the field of real estate. . . ."

Consumer Representation on Real Estate Boards

A recent development among state regulatory agencies in response to the public criticism that regulated industries were being regulated by their own members in the name of government is to add one "consumer" member to the regulatory board. The real estate licensing boards are no exception to this trend. For example, Iowa law requires that two of the five board members not be licensees. Kentucky and Wisconsin laws call for one consumer member. California legislators added one public member to each licensing board in 1958. The change was insignificant, and recently the legislature has put public members in the majority on all licensing boards except those of the healing arts and accounting. In all other states, to the best of available knowledge, real estate brokers hold all or a strong majority of the seats on state real estate regulatory boards.

Real Estate Sales across State Lines—a Consumer Sales Scandal

The state's approach to maintaining law and order in the transfer of land ownership has focused on the piece of land being transferred. State law and regulation and custom and practice relate only to real estate in that state. This concentration of focus by regulators on property within the state has left open the way for one of the grossest consumer sales scandals of recent decades—the sale of undeveloped land in one state to residents of another state.

Underwater land in Florida has been sold to Iowans without the Florida or Iowa real estate agency exacting accountability from the sellers, and plots of Arizona and California desert land have probably been sold in most states with suprising lack of accountability being exacted by state authorities.

A state has the power to govern transactions occurring in that state. Governing the fairness of the transaction regardless of where the property being transferred is located is a challenge states have been regrettably slow to accept.

Tenant Rights to Use of Rented Real Estate

A consumer concern that is moving to the forefront and which derives from state real estate law is the need to define the rights of renters and owners of property rented in today's urban housing market.

Laws governing owner-renter contract terms are state laws with few exceptions. These laws came from England as a part of the common law. As a product of custom and court decisions, they no doubt were practical in governing the relations between two planters when one of them owned more land than he could tend and rented some of it to another planter. In time, landlord-tenant laws came to be enacted and written into most state law books.

Tenant organizations complain to state legislators today that these laws fit a former era better than they fit the conditions of urban life now and urge that they be rewritten. Generally, they express a property owner bias. They presuppose a tenant to whom the shelter rented was only secondary to the land on which it sat. The tenant rented the land, and the shelter came with it. The tenant gained yield from the land first and shelter secondarily.

It is estimated that about one-fourth of the families in the United States are renters. As John McCabe, legislative director of the National Conference of Commissioners on Uniform State Laws, expresses it; they "have an incredible vulnerability in the urban setting."[8] The rate of growth among United States renters is largest among middle-income families.

Typically, state landlord-tenant laws enacted in an earlier day have left renters without essential rights: renters must pay the rent regardless of habitability or default on the part of the landlord; they have no recourse for challenging habitability problems; building codes are too often honored in the breach; and urban leases too often contain disenfranchising provisions, such as a confession of judgment or provision for paying the landlord's attorney fees.

Efforts to improve renter rights gained momentum in the 60s. Pennsylvania is among the states which passed laws providing for withholding rent in escrow. Laws governing security deposits and the conditions of their return have been passed, and confessions of judgment are being outlawed in some states.

---

[8]John McCabe in *Proceedings of the Second National Seminar for Consumer Representation in State and Local Government* (Milwaukee, WI: Center for Consumer Affairs, University of Wisconsin-Extension, 1974); p. 61.

A broad-gauged approach to overall reform was also begun. It is carried on through an institution designed to enable states to address problems which they all face and to reduce needless variation in laws from state to state. That institution, headquartered in Chicago, is the National Conference of Commissioners on Uniform State Laws.

In 1972, after some years of study, conference and compromise, a proposed uniform landlord-tenant act was presented by the National Conference to state legislatures for their consideration. As Mr. McCabe described it, "it coalesced all the threads developing in the states."[9] The proposal attempts to establish a workable parity between the urban renter's and property owner's rights.

According to the National Conference fifteen states have enacted it in some form. They are Alaska, Arizona, Connecticut, Florida, Hawaii, Kansas (substantially similar), Kentucky, Michigan, Montana, Nebraska, New Mexico, Oregon, Tennessee, Virginia, and Washington (substantially similar).

Its passage has been bitterly resisted by associations of property owners and home builders in most states.

Personal Property

State Consumer Credit Laws Bear Directly on Personal Property Rights

The basic relationship between the buyer and seller of personal property is left to the states to define and enforce. Because credit is used to buy most large-ticket items, the credit laws of the state enter into that definition and enforcement.

Think of the last time you bought a car. If you were one of the few buyers who paid in full at the time of purchase, the auto dealer probably took over the responsibility of filing the record of your ownership with the state Department of Motor Vehicles or its equivalent. You receive your title from the state—your evidence that you are the owner.

If you finance your purchase, that fact goes on file with the appropriate state agency showing that you are the buyer but recording the name of the bank or credit union which holds the title. When you complete all payments, the holder of the title requests the state to issue you an ownership certificate. Thus, the state certifies ownership of much personal as well as real property.

---

[9]McCabe, p. 62.

Generally, in the transfer of personal property, we in the United States have not followed the British model of defining by statute the rights and responsibilities of consumer and retailer in a sales transaction. Rather we have left undefined, except by the precedent of case law and the statutes of fraud, such fundamentals as when a consumer purchase is a contract and even in what specific ways the seller is accountable to the consumer-purchaser.

For example, is a $25 consumer purchase a contract between the consumer and the retailer? When a consumer who bought an Oldsmobile found out it had a Chevrolet engine in 1977, what recourse did that consumer legally have from the auto dealer who sold the car and got the consumer's legally enforceable commitment to pay? When a supermarket sells a package of a nationally advertised food product that weighs less than the package claims, what recourse does the consumer have from the supermarket?

Except in credit purchases, much of the area of *buyer's rights* remains unclear in the United States today. Consumers enter into buying agreements practically every day. Why does it matter whether a purchase is a contract or not? A contract is legally enforceable by a court of law.

United States consumers are advised in *What Everyone Needs to Know About Law* that a contract for the sale of goods for the price of $500 or more, or a contract extending over more than one year, or a contract guaranteeing payment of a debt must be in writing to be enforceable. But most buying agreements do not come under these categories. Oral agreements are fully enforceable. "Their sole disadvantage is that they are more difficult to prove."[10]

This very helpful book of advice concludes its chapter on contracts with this caveat: "Because the law varies widely from state to state and because each factual situation may mean different exceptions or extensions of the principles discussed here, competent legal advice may be necessary to fully protect your interests."[11]

In contrast to the cloudy contract rights United States consumers have, the English consumer's contract rights are clear and statutory. An advice book for English consumers puts these rights straightforwardly:

> Every time you purchase goods you make a contract, and the law lays down certain terms that apply in every contract

---

[10]*What Everyone Needs to Know About Law* (Washington, D.C.: U.S. News and World Report Books, 1973), p. 72.

[11]*What Everyone Needs to Know About Law*, p. 84.

of sale. In brief, goods you buy

- must be as they are described
- must be of merchantable quality
- must be fit for their intended purpose

and of course the seller must have a right to sell them.

> These are "implied terms" of every contract of sale, and they are set out in the Sale of Goods Act 1893. If the goods you buy do not measure up to these implied terms, then the seller has broken his contract with you and you will have a claim against him.[12]

As this quote makes clear, consumers in England have had readily enforceable contract rights in purchases, small as well as large, for eighty-five years—rights that consumers in the United States have not yet won.

With the law behind them, aggrieved English consumers go directly to the retailer and assert their claims. Under the law, it is the retailer's responsibility to make good the bargain in all three respects. If the consumer does not find satisfaction from asserting his rights to the retailer, then and only then will a consumer adviser in one of the more than 100 consumer advice centers look into the problem. These advice centers are run by local government with national government funds. The consumer adviser, from a position of greater experience, may suggest a better approach, or may intercede with the merchant, or even go to county court with the aggrieved consumer as a "friend" and help the consumer present his case for ultimate decision. The county courts limit costs of going to court when the amount is small, but the loser has to pay the winner's costs.

Great Britain is not unique in giving consumers specific contract rights in making their many purchases. Norway has recently passed a Sale of Goods Act giving consumers in that country rights *vis-a-vis* the retailer. There may be other examples as well.

Consumer Credit Laws Govern Many of the Conditions under Which Personal Property Is Bought and Sold

Because nearly all *consumer hard goods* are bought on credit, state consumer credit laws bear directly on every family. Revolving credit, credit cards, and installment purchases all operate within and usually "up to" the boundaries of legality established by the

---

[12]Lynne Titchiner and Anne Winyard, *Consumers' Rights* (London: Arrow Books, 1975), p. 25.

state constitution, legislative statutes, and administrative regulation. It is, therefore, necessary to know your state consumer credit laws and regulations to know what your ownership rights are.

State statutes specify when and how your car may be repossessed not only if you fall behind in the payments—but sometimes even if it only appears to the lender that you may fall behind. They distinguish between a conditional sales contract and revolving credit. The important legal distinction is that the title remains in the hands of the seller with a conditional, or installment, sales contract. Hence, sellers tend to use the conditional sales—or installment contract—for most large consumer purchases in order to maintain greater control, including the right to readily repossess the merchandise. The maximum interest rates consumers can be charged on conditional sales, credit cards, revolving charge accounts, and loans are set by state legislatures; and, except for auto loans, most credit charges are at the statutory maximum.

Most state constitutions have set limits on allowable interest rates by setting a percent of interest, charging above which constitutes usury. Of course, usury is prohibited. Over time, however, many of these constitutional limits have been riddled with amendments exempting one type of creditor after another.

In California the State Supreme Court has recently struck down the constitutional provision identifying rates of more than 10 percent as usury. So many exemptions had been added over the years that the court found it unfair to apply it to the few, mostly individuals, who had not gained exemption. Tennessee's voters have just repealed that state's 10 percent usury definition.

Multiple Regulatory Agencies Administer Consumer Credit Laws

Administrative agencies carry out the legislative direction by making specific rules and regulations.

Generally at the state level, there are several agencies governing a family's personal property ownership and financing rights. Each type of financial industry prefers its type of business to be regulated separately from other competitive ones; hence, there may be a state banking commissioner, a savings and loan commissioner, a credit union commissioner, a real estate commissioner, and a consumer loan commissioner. The consumer loan commissioner is not likely to be given that name. His job is to regulate finance companies, such as Household, Beneficial, and Avco: the debt consolidators; and often collection agencies. His title may be euphemistically imprecise. In California, the Corporations Commissioner oversees finance companies which are legally designated as personal property brokers.

Opposing Efforts to Rewrite and Consolidate State Consumer Credit Laws

The Uniform Consumer Credit Code

A major effort was made in the early 60s by several types of consumer credit institutions to achieve agreement on a proposed state Uniform Consumer Credit Code. The code which came to be known as the UCCC was urged upon every state for adoption and would govern nearly all consumer credit transactions involving any personal property or service.

The large national companies which do business in many states would find their circumstances of doing business eased, their multiplicity of forms reduced, and some of their practices newly legalized. The introduction of revolving credit had brought to light fundamental questions of legality which were especially worrisome to them.

The trade associations in the lending and consumer field—that is, the bankers' association, consumer finance association, and others—each contributed funds to the Special Committee on Retail Installment Sales, Consumer Credit, Small Loans and Usury of the National Conference of Commissioners on Uniform State Laws. Its staff, with an advisory committee, proceeded to produce draft after draft of a proposal. The advisory committee had only one consumer member and one former state regulator.

Drafts were submitted for comment to several consumer representatives in the process, and some of them became alarmed. When their efforts to produce major change in the proposal proved futile, some consumer groups began to take action to stop the adoption of the UCCC and then to make a counterproposal.

The Consumer Counterproposal

Consumer Federation of America passed a resolution of "unalterable" opposition to the UCCC at their annual meeting in 1969.

The Consumer Research Foundation published a volume, *Consumer Viewpoints on the Uniform Consumer Credit Code*, and a guide and cross-reference to aid consumers in studying and understanding the import of the UCCC.

With funds granted from Consumers Union, sessions of a Consumer Federation of America drafting committee produced a positive position statement which was adopted in 1971 by CFA's executive committee. That organization followed through by holding regional conferences on the subject for consumer leaders.

This organized opposition slowed the adoption of the UCCC by the states and encouraged the leadership of the Consumer Research Foundation and the newly created National Consumer Law Center to draft an alternative proposal. That alternative proposal was the genesis of the Wisconsin Consumer Act, which was signed into law in 1972 and became effective March 1, 1973.

The UCCC, with some modifications in every case, has been adopted in ten states. They are Colorado, Idaho, Indiana, Iowa, Kansas, Maine, Oklahoma, South Carolina, Utah, and Wyoming.

Both the Wisconsin Consumer Act and the UCCC *codify*, or bring together, statutes and regulations that had been enacted piecemeal and were scattered throughout the state's statutes and regulations.

Thus, such matters as interest rates, wage garnishment for delinquency, holder-in-due course, repossession, and other definition of rights to use and to title were brought together. They both also treat practices of recent origin such as revolving credit and credit cards.

However, the way in which they treat the relationship between the creditor and the debtor differs. It is fair to say that the thrust of the UCCC is to reaffirm most of the owner-creditor rights and advantages in the relationship. The thrust of the Wisconsin Consumer Act is to establish a balanced peer relationship of rights and responsibilities between owner-creditor and consumer-debtor. Both call for an administrator. The Wisconsin Consumer Act established a consumer credit division in the banking commissioner's office. This consumer credit division processes complaints, reviews contract forms for conformance with the Act, gives legal opinions, conducts investigations, brings education programs to both consumers and creditors, and strives to secure voluntary compliance with the Act. Where voluntary compliance cannot be obtained, complaints are taken to the attorney general.

Such surveillance over consumer credit transactions as the Wisconsin Consumer Act established in the consumer credit division of the Wisconsin Office of the Commissioner of Banking has not been established in most other states. Typically, it has been fought by the retailers whose lobby at the state level is a powerful one.

State Chartering and Licensing of Lenders and Debt Collection Agencies

Every state licenses and regulates lenders making consumer loans as well as debt collection agencies, chartered banks, savings and loans, and credit unions. The federal government also charters banks, savings and loans, and credit unions. Thus, these types of financial institutions have a choice of chartering agency. State-chartered financial institutions are eligible for federal deposit insurance

for their customers just as federally chartered organizations are. Both are subject to the maximum set by federal regulation on the rate of interest they can pay consumers for their savings.

Federal Entry into Regulation of Consumer Credit Practices

The federal government has, in the last two decades, entered into the consumer credit field in a limited way. Consumer efforts to achieve the right to be told interest rates in comparable terms were turned back at the state legislatures by the unified opposition of retailers, banks, auto dealers, and finance companies. Finally, Senator Paul Douglas' persistence in the United States Senate gained enough support to enact *truth-in-lending*, directing the Federal Reserve Bank Board to adopt and enforce regulations specifying how interest rates may be legally expressed and requiring written statements of the rates on the opening of an account or the execution of a loan.

Other federal ventures into the consumer credit area include legislation which requires credit reporting companies to allow persons to know the information in their file, requires retailers and lenders to avoid discriminating against women in granting credit, and strikes down some abusive and unconscionable collection agency practices. The responsibility for enforcing the Truth-in-Lending, Fair Credit Reporting, and Fair Debt Collection Practices Acts is scattered among nine federal agencies; while the responsibilities under the Equal Credit Opportunity Act are shared by twelve federal agencies.

Summary

Notwithstanding federal requirements of recent years, the great body of law and regulation that governs consumer purchases of both goods and services is still state law and regulation.

Who owns what and who owes whom how much is fundamentally the right of the states to determine. Likewise, what each party can do about it is determined by the states. It has been this way for more than 300 years, longer than the United States has existed.

The *U.S. News and World Report* in their February 20, 1978 issue quotes an unidentified business owner as saying; "Government has no place in business whatsoever."[13]

This is a sentiment frequently uttered. Does he mean he wants to do business where there are no official records of property

---

[13] *U.S. News and World Report*, February 20, 1978, p. 17.

ownership, no courts to determine ownership in case of disputed claims, no laws to enforce payment to him for goods sold on credit, no market for his accounts receivable because government is not defining and enforcing negotiable paper? Of course not.

PART III

LITIGATION AS REGULATION

In the generic sense the courts are regulatory agencies. Access to them is as important to consumers as is the access to administrative agencies, such as the insurance commissioner and the public utility commission. Legislatures make the rules of everyday commerce, of buying and selling, owning and owing. As disputes are brought before the courts, the court not only settles the dispute, but in the process makes case law and gives definition and interpretation to the legislation.

Professor Abram Chayes of the Harvard Law School says litigation is part of a broader political process.

> It is not just a question of settling disputes between private parties or even between citizens and government. The basic function of federal and a good deal of state litigation, as I see it now, is defining and implementing entitlements that are implicit in the Constitution or in legislatively developed programs.

Professor Chayes argues that access to the courts is vitally important, for

> they are responsive to grievances in a way that some other institutions are not. You put a letter in that slot, you are bound to get an answer. You may not like the answer, but you're going to get one. That's more than some institutions can say.[14]

We have already seen that the California Supreme Court made consumer credit law when they struck down the usury provision in that state's constitution.

It was the Wisconsin Supreme Court which ruled, when the case reached them on appeal, that J. C. Penney's revolving "carrying charges" were usurious. Consumers were entitled to a refund of the illegal charges. Moreover, the vulnerability of other retailers to

---

[14] *Public Interest Perspectives : The Next Four Years* (Washington, D.C.: Public Citizen, Inc., 1977); p. 33.

similar suits and judgments created a political climate in Wisconsin that made it possible to enact the sweeping changes of the Wisconsin Consumer Act.

It was the threat of lawsuits in many states that led General Motors to offer money or motor replacement to the Oldsmobile buyers who had been deceived by the company's advertisements and sales talks about the "Rocket" engines they were buying.

These and other examples which could be cited demonstrate that litigation between buyer and seller in the courts *if carried through to a court decision,* does in itself, under our case law system, make regulations governing the marketplace.

By defining the rights and obligations of the two parties to a contract, a court decision from a court of record: that is, a court which makes a written record of the proceedings and the decision, sets by precedent the likely outcome of a similar case were it to be brought to a court of that state. Such decisions serve as guidelines for the conduct of buyer and seller in their dealings with each other.

Further, litigation is often the only way an aggrieved consumer can get his money back—or get what he was promised by the seller. An administrative agency, when there is one with a responsibility over the type of mistreatment the consumer has experienced, may at best exact a fine from the company, serve them with a warning, or get a written promise from them to stop doing what the consumer alleges they did without admitting to having done it.

Each of these remedies may protect future consumers but leaves the consumer who filed the complaint to suffer his own loss. Litigation provides a possibility of his being made whole, either by getting a satisfactory replacement of what he paid for or getting his money back.

As has been explained, the entire relationship between consumer purchaser and seller in England rests on the assumption the consumer will bring about litigation if the seller fails to respect his legal rights.

To encourage the development of a similar climate in this country—and to forestall the need for creating even more regulatory agencies—some state legislatures are watchful when clarifying consumer rights legislatively to provide incentives to attorneys to represent consumers in litigation. Such incentives may include requiring the seller to pay the fees of the attorney who represents the consumer in the event the court rules for the consumer. Another incentive is to allow the court to award triple damages so that when the amount at stake in an individual case is small but the principle of the practice is not, an award over and above *making the consumer whole*

can provide something extra for attorneys fees and hopefully serve to deter the seller from continuing the practice with other customers.

Even where such incentives exist in consumer law, they are used too infrequently to make litigation and the threat of litigation the regulatory force it could be at the state level.

Perhaps too few consumers know of the possibility of getting an attorney's fees covered if the case is successful or of getting triple damages. There is also the problem that few attorneys specialize in consumer law or are identifiable and available to consumers who have suffered a legal wrong in buying their daily needs.

In certain areas of the country, the Legal Aid program of the courts and the Bar has for many decades served the poor as they needed representation in court, usually in connection with divorce, adoptions, deaths, and other family relationships. Further, the Courts carrying out our commitment to equal representation before the law, have appointed public defenders for any person accused by the state of a crime when that person has had no money to pay an attorney. Thus, attorney representation as necessary is well established in our legal tradition.

During the 60s this citizen entitlement was greatly enhanced by the decision of Congress to fund the creation of Neighborhood Legal Services for low-income citizens. These exist throughout most of the country now on a permanent basis and with a stabilized continuing quasi-public form of national governance in the Legal Services Corporation. Although litigation of consumer cases represents a small part of the work of these Legal Services offices, the consumer litigation they do may be the greater part of all that is being done.

Group legal services are coming into existence in some places where a group of citizens contract for specified legal services for the members of the group. Sometimes they contract with a single firm of attorneys or hire their own attorney on salary, and sometimes a member may choose any attorney from a panel which has been screened and has agreed to accept a specific fee rate. Most such group legal services have been negotiated by labor organizations as a benefit for the union members and are paid for by the employer. A notable group legal service with a different base is the one sponsored by the Consumers Cooperative of Berkeley for members who may join for an annual fee and who receive a specified set of services as needed and educational opportunities as desired.

The development of group legal services is seen by many as a means of providing middle-income families with access to legal service. The gamut of legal services available in this form is far broader than consumer representation, but inclusion of consumer representation will facilitate more litigation of consumer legal rights and enhance regulation of the marketplace through litigation.

CLASS ACTION

Consumers are fighting hard for legislation easing access to the courts for a group of consumers each similarly wronged. Judges on the United States Supreme Court have been effectively shrinking that access recently and thereby, as consumers see it, encouraging unfair seller practices which injure, cheat, or defraud no one consumer to the extent that a court judgment would pay the cost of going to court. Yet, by perpetrating the same injury on many consumers, the seller is enriched, the honest competitors are at a disadvantage in the market, and the processes of justice are thwarted.

Consumer organizations are striving to obtain legislation requiring the courts to accept and hear a case brought before it as a class action by a group of persons similarly aggrieved or one person representing himself and all other persons similarly situated who may not be a party to the action and may not be known to each other.

Some states now permit potentially effective class action suits: some of the larger states doing so are California, New York, New Jersey, and Pennsylvania.

CAB MOVES TO RELAX C... Goo...

By Stephen M. Aug
Washington Star Staff Writer

The Civil Aeronautics Board has indicated it intends to approve new rules that will make it just about as simple for airline passengers to take charter flights as to buy tickets for regularly scheduled flights.

Although the new ... continue to ma... between ch... lines ...

• The minimum size gr... to fly charter pla... person, who ... and buy ... quir...

The FTC/Kid's TV Argument

By Nancy L. Ross

The Federal Trade Commission yesterday moved toward an ultimate ban on television advertising aimed at young children. It would be directed primarily at ads for sugared snack foods.

The commission voted 4-to-0 to proceed with rule-making on the basis of a staff report that recommends the ... measures; ... TV advertising for ... children too ... under 8—to ...

sugary or less risky foods be balanced by nutritional and/or health disclosures funded by the advertisers.

At the same time the FTC said it would solicit ... lic and the ... remedies it ... outright ... Rand Dix... ads, incl... and nut... the bod...

The ... acro... low... po... al...

cent, albeit a little late." Choate, who heads the Council on Children, Media and Merchandising, also lauded the commission for holding open hearings and getting the issue aired in public instead of presenting the rule as ing the rule as a *fait accompli*.

A spokesman for General Mills pressed "deep concern and disap... that the FTC staff disre... ...ely the persuasive and ...ted to the comm... in the ... adv...

EPA Rejects Grant to Aid Sewer Order

THE MILWAUKEE JOURNAL 3/6/78

Auto-Train May Face SEC Probe

Washington, D.C. —AP— The Securities and Exchange Commission reportedly is investigating possible kickbacks and political payoffs by ...

learn how the company managed to have itself excluded from a federal law, with the result that some of its activities were exempted from competition by Amtrak.

The subpena, the Star said, also asks for m... on "past, ongoing ... payments of mo... person in orde... favorable actio... ernment, gov... quasi-governm... mentally, f... local," or a... pointed of... for office...

that it never discusses investigations.

Eugene K. Garfield, president of Auto-Train, also said he had no comment.

The company transports passengers and their automobiles ...

...e district's director ... ...l services.

...ot Enforceable

...request was rejecte... EPA officials believ... ...ect "is not an enforc... ...ovision of the Wate... ...on Control Act an... ...y are not recognizin... ...eral judge's decision.

ICC Given Poor Mark

Washington, D.C. —AP— The Interstate Commerce Commission is putting unnecessary barriers in the path of truckers seeking to enter the freight hauling business, the ...

FCC Delays Decision On Sale of WJLA-TV

...deral Communications ...put off until next ... on the sale of ... to Com... of ...

THE WASHINGTON POST Wednesday, March 1, 1978

FDA Approves Epilepsy Dr...

Associated Press

The Food and Drug Administration announced yesterday it has granted its approval of the anti-seizure drug valproic acid for the treatment of petit mal epilepsy.

The drug will be sold in the United States by Abbott Laboratories under the brand name Depakene. It is ... ically similar to sodium ... which is widely used ... tries and which ... tion of Am... for ...

conjunction with other epile... in the treatment of parti... ple seizure types ... An estimated ... lion persons ... fer from ...

CONSUMER PRODUCT SAFETY COMMISSION

[CP 78-9]

BOUNCE FABRIC SOFTENER

Denial of Petition

AGENCY: Consumer Prod... Commission.

ACTION: Denial of petiti...

PART IV

USE OF POLICE POWER TO REGULATE BUSINESS VESTED WITH THE PUBLIC INTEREST

THE STATE CHARTERING OF CORPORATIONS

The "mom and pop" store is the idealized form of free enterprise in the United States. It is an avowed concern for mom and pop that some state legislators assert as the basis for their opposition to legislative proposals submitted by consumer organizations. Yet, it is the business corporation that is predominant in the marketplace, not the small family enterprise, and again it is the state which charters and thereby creates corporations. It has been this way throughout our history. Massachusetts, Rhode Island, Connecticut, and Pennsylvania chartered business corporations while still colonies.

It is a state legislature which enacts special legislation to create a special corporation, and it is the state legislature in every state which enacts general incorporation legislation, establishing the rules for incorporating in that state. Although Delaware has achieved fame for the number of large national corporations which call Delaware their legal home, most corporations take out their incorporation papers in the state where their headquarters are located and are governed in their corporate affairs by that state.

Merrick Dodd in his book, *American Business Corporations Until 1860*, notes that

> . . . statutory law is a vitally important part of business corporation law, since every corporation owes its creation as a legal entity, as well as many of the rules which govern its activity, to some statute or statutes.[15]

Further, he adds, ". . . American business corporation law, other than constitutional law, is state rather than federal law."[16] That law began "on its legislative side," he notes

> . . . with acts of incorporation which American legislatures began to enact towards the close of the Revolutionary War, and on its judicial side when the corporations so created began a few years later to be involved in litigation. These early business corporations and their successors had

---

[15]Edwin Merrick Dodd, *American Business Corporations Until 1860* (Cambridge: Harvard University Press, 1954), p. 2.

[16]Dodd, p. 2.

> to be fitted into the framework of our American political society and our federal and state constitutions.[17]

Dodd reports, speaking of the period 1830-1860:

> Corporations could with the aid of a friendly legislature obtain constitutional immunity from the legislative power to tax and—in the case of public service companies at least—from the legislative power to incorporate competing enterprises.[18]

Corporations also found the legislatures during that period amenable to changing their original charter to allow additional privileges.

> In an era in which most corporations owed their existence to special legislative acts, most corporate charters defined the nature and scope of the enterprise in rather rigid terms and made no provision for subsequent changes. As a result of this situation, the directors of business corporations, usually with the consent or acquiescence of the majority shareholders, not infrequently induced legislatures to enact new special acts granting additional or different corporate powers and legislatures less frequently enacted general laws which purported to permit certain types of corporations, including corporations which already existed, to exercise powers not granted by their charters.[19]

Professor Dodd's research tells us that in the beginning of their history, state legislatures generally first chartered banks, sometimes reserving for the state a piece of the action—the right of the state to buy some shares and sometimes, as in Massachusetts, requiring the newly chartered bank to make a certain proportion of its loans to farmers. Next in order were toll roads and canals, then insurance companies.

We have already dealt briefly with banks and other financial institutions. Because of the early history and special status of state chartering, we will next discuss public service or public utility companies, their chartering and their regulation, and then the insurance industry and its regulation or lack thereof.

---

[17]Dodd, p. 1.

[18]Dodd, p. 132.

[19]Dodd, p. 133.

PUBLIC UTILITIES

With the record escalation in energy prices, consumers are becoming more concerned about how their gas and electric bills are determined and how they can effectively participate in that determination. Again it is at the state level where the structure is established and where the decisions are largely made. This circumstance arises out of the fact that states charter corporations.[20]

The earliest utilities chartered by state legislatures were toll roads, ferries, and canals—creating an inducement for improving means of transportation and often, but not always, conferring a monopoly along with the charter. If Massachusetts can be taken as an example, the legislative intent concerning monopoly rights was difficult to identify—the charter generally being silent on that subject—and litigation was common when another enterprise sought a charter to operate alongside the first.

Cases were argued and reargued all the way to the Supreme Court.

How did corporations grant charters to develop water companies or toll bridges or railroads come to be distinguished from corporations granted charters to engage in mining or manufacture and come to be known as public utilities? Essentially, the distinction grew because in chartering the water companies, the toll bridges, and railroads, the state legislature also conferred on those corporations the state's right of eminent domain—the right to seize another person's property. At times they also conferred this right to manufacturing corporations. Protesting property owners in the path of the railway or the water pipe or the new mill went to court in an effort to avoid the forced sale eminent domain had brought upon them. Judicial decisions in these cases, over time, upheld the state's granting of its authority into private hands *only for public purposes*, not for private. In other words,

---

[20]The few instances of federal charters are mostly banks and some other financial institutions as discussed in Part II.

private property could be seized by eminent domain for a water company, a public bridge, or railroad but not for a mine or a factory.

According to Professor Dodd, in 1831 a grant of eminent domain to a railroad was tested in New York.[21] The court ruled that

> . . . the railroad corporation's acceptance of the franchise of making a railroad and taking tolls on it carried with it the legal duty not to refuse to transport any persons or property and the legal right of the legislature to regulate railroad "tolls."[22]

Upholding the legislative grant of eminent domain to a private railroad corporation, a Michigan judge, George Martin, gave us the test to apply. It is not, he reasoned, whether the corporation is privately owned and operated instead of being a public corporation like a municipality or a county. The test to apply is the object for which the corporation exists. He quoted Chief Justice Marshall as saying, "The power to create a corporation is never used for its own sake, but for the purpose of effecting something else." He wrote in his decision of "*three* grand classes of corporations":

1. *Political or municipal corporations*, such as counties, towns, cities, and villages, which, from their nature, are subject to the unlimited control of the Legislature;

2. Those associations which are created for *public benefit* and to which the government delegates a portion of its sovereign power, to be exercised for public utility, such as turnpike, bridge, canal, and railroad companies; and

3. Strictly *private corporations* where the *private interest* of the corporators is the primary object of the association, such as banking, insurance, manufacturing and trading companies, and in this class may be included eleemosynary corporations, generally.

Of the third class, the strictly private corporations, the object, he said,

> . . . is to aggregate the capital, the talents, and the skill of individuals, to foster industry and encourage the arts. Private advantage is the ultimate, as well

---

[21] *Beekman* v. *Saratoga and Schenectady Railroad Company* (New York, Chapter 1831)

[22] Dodd, pp. 158-59.

> as the immediate object of their creation and such as results to the public is incidental . . . .

On the other hand, that class of corporations whose object is public benefit, the judge reasoned, are altogether different.

> Their very existence is based upon the delegation to them of the sovereign power to take private property for public use, and upon the continued exercise of that power in the use of the property for the purposes for which it was condemned.

. . . [I]t is obvious," he concluded, "that the *object* which determines the character of a corporation is that *designed* by the legislature rather than *sought* by the company."[23]

In a Wisconsin case decided in 1857, the court ruled for a suing consumer and held that a gas company given monopolistic privileges has an implied legal obligation to supply gas to customers on reasonable terms.

Thus it was the *courts* which, more than 125 years ago, sorted out and evolved—from the special chartering of corporations all state legislatures engaged in freely—the concept of the public utility corporation. Again case law, rather than statutory law, built the legal base of public utility corporations and their rights and responsibilities.

Categories of Chartered Public Utilities by Function

Public utility corporations chartered by state legislatures can be grouped into four categories according to the type of function.

1. Water, sanitation, sewage, irrigation, flood control
2. Power, light, and heat
3. Communication services
4. Transportation

In all four categories, we find a mix of publicly owned and privately owned corporations providing services. The highest proportion of publicly owned facilities are found in the first category of water and waste services. When these services are supplied by

---

[23]Dodd, pp. 159-60.

chartered corporations, the corporations are most often publicly owned, as well as publicly operated. There are, of course, privately owned corporations chartered by the state and operating water companies and garbage pickup, for example, on franchises from local governments.

In power, light, and heat, we find such major public suppliers as Los Angeles and Sacramento, California, and Springfield, Illinois. Municipal gas companies have organized a national association to work together in mutual aid. The distribution but not the generation of electric power is carried out by consumer owned cooperatives in many rural and formerly rural parts of the country. These Rural Cooperative Associations have banded together in state organizations, as well as in a national one for mutual aid.

Most of the electricity and gas supplied to users in the United States, however, is supplied by privately owned corporations, each of which is chartered by a state and franchised by local governments to provide exclusive service in the area of the franchise.

Among communication services, the major publicly held organization is the post office, and the major privately held organization is American Telephone and Telegraph Corporation. It is in communication services that the role of state and local government is muddiest so far as utility regulation is concerned. Never too clear, even with the telephone which has been in our midst for nearly a century, the state and local regulatory stance to cable television, subscription television, teletype, and leased wire services is, to say the least, in a state of confusion. It is by no means clear whether it is in the public interest to grant exclusive franchises.

Public Utility Concepts

Transportation (here including docks, warehousing, etcetera) is one of the earliest forms of utilities chartered by state government, and litigation over the meaning of transportation charters gave us our basic public utility concepts. Also, it was the perceived need to exert more control over railroads than the state legislatures and the courts could provide that gave impetus to legislation creating administrative regulatory agencies to perform the public regulatory function on a full-time basis.

It is an irony of existence that the concepts underlying our state regulation of gas, electric, and water utilities were developed for the regulation of railroads, which have long since faded from

the state regulatory scene. Some of the concepts of public utility regulation are the following:

1. *The essence of public utility service is centralized supply.*[24] This fact has implications for consumers who have visions of providing their own heat and lights by capturing solar energy themselves.

2. *A public utility, by its very nature, concentrates financial resources.* What Professor John R. Commons said about American capitalism generally is even more true about private corporations on which public utility status has been conferred.

> In modern capitalism, the most important stabilized economic relations are those of private property. But property relations are something fixed and permanent. They are undergoing change all the time within the processes of collective action . . . . Capitalism in its highest form, as found in the United States, is built upon this legal foundation of private property, latterly modified by the emergence of joint-stock corporations, holding companies, banks, labor unions, and political parties seeking control of the state . . . . The main characteristic of this twentieth century economics and the reason why it can be distinguished as banker capitalism are the large amounts of savings of millions of investors that must be brought together in order to finance these huge aggregations of machinery, and armies of employees, made possible by science, invention, and world wide markets.[25]

3. *Public utilities are expected to deal reasonably.* To quote Professor Martin Glaeser,

> . . . [W]here the supply of a given commodity or service has been *monopolized*, so that a given producer has achieved complete control over the same, and when the demand for

---

[24]Martin S. Glaeser, *Public Utilities in American Capitalism* (New York: Macmillan, 1957), p. 168.

[25]John R. Commons, *The Economics of Collective Action* (New York: Macmillan, 1950), pp. 21, 67.

> such commodity and service is sufficiently general so that it has become a *common necessity*, the economic power of such a producer must be curbed by the application of political power so that he will deal reasonably with those who are dependent upon him for supply. This status of being required to "deal reasonably" has been called *"the public utility status . . . ."*[26]

4. *Public utilities are expected to open their services to all in their franchise area.* They cannot let wants for their service go unmet.

5. *Public utilities are expected to render reasonably adequate services.*

6. *Public utilities are expected to sell their services, not look to government for funds but to look to the users of their services for their support.* With poor families unable to pay greatly increased heating bills of late, the utilities have adhered to this concept, as has government. The utilities insist on their right to cut off delinquent customers and leave it to government to put money in the hands of the poor to pay the utility its regular charges.

7. *Public utilities are expected to charge a "just price"—that price which will repay their expenses.* Hence, rate increase hearings deal mostly with analysis of expense statements submitted as justification for the rate increase.

8. *A fair rate of return is the utility's just due.* What is a fair return? That is very much debated these days. New Mexico has settled on 14 percent as a fair return which will be allowed without hearings. A further and even larger question is percent of what? This gives rise to argument over valuation of the utility's properties and what should be included as an allowable business expense, chargeable to the rate payers.

General Chartered Corporations Vested with a Public Interest

So far we have been discussing those corporations which petition the state and/or local governments to be chartered to perform public

---

[26]Glaeser, p. 8.

utility operations and which are so chartered. But can a state impose public utility status on an unwilling corporation already carrying on a private business?

Can a state lay the obligations of a public utility upon a private corporation which, in its own view, is quietly going about its own business? The answer came from the United States Supreme Court 100 years ago in a landmark case, *Munn* v. *Illinois* (94 U.S. 113).[27] Farmers, displeased with their lack of bargaining power with railroads, grain elevators, and other services they were forced by circumstances to use, organized themselves into the Patrons of Husbandry (later to become known as the National Grange). As Grangers, they took collective political action. Among other measures, they urged state legislators to use lawmaking power to curb some of the injustices being done them. In Illinois one of the legislative responses was to pass a law in 1871 setting maximum rates which grain elevators could charge for storing grain and requiring a license for each grain elevator.

Two partners, Munn and Scott, had had a grain elevator in Chicago since 1862. They refused to apply for a license and continued to charge rates higher than the maximum set by the legislature. Soon they were convicted and fined in accordance with the provisions of the Act, and they appealed their conviction. They took their stand on the Fourteenth Amendment, claiming Illinois had violated it by depriving them of property without due process of law. The power of the state to assert controls over a previously uncontrolled private business was at issue. The appeal went all the way to the United States Supreme Court, and in 1877 that court settled the issue by ruling that Munn and Scott must submit to the state regulation or cease business in the regulated field. The court found that Munn and Scott's grain storage business was "affected with a public interest" standing as it did "in the very gateway of commerce and taking toll from all who pass." As Chief Justice Waite wrote, when

> . . . one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use and must submit to be controlled by the public for the common good to the extent of the interest he has created. He may withdraw his grant by discontinuing the use; but so long as he maintains the use, he must submit to the control.[28]

---

[27]Glaeser, p. 207.

[28]Glaeser, p. 207.

Dr. Jonathan Hughes has written about the significance of this decision:

> However much the decision rocked the American legal profession (and it did) in that age of triumphant laissez faire economics, *Munn* v. *Illinois* was not the beginning of something new: it really measured the limit of something old. Waite was right. The power to control business was vested in state governments; it had indeed been exercised by the colonial governments and in England for centuries before that.[29]

Urged by the Granger movement and heartened by the Munn victory, state legislatures tackled regulation of the railroads and within a decade were rebuffed by the United States Supreme Court decision in *Wabash, St. Louis, & Pacific Railway* v. *Illinois*. Though the railroad was violating Illinois law forbidding higher rates for short hauls than for long, the law was struck down by the high court for interfering with commerce between states, a power granted to the federal government by the United States Constitution. This decision was announced in 1886; and in 1887, only ten years after the Munn decision, the federal government created the Interstate Commerce Commission.

In the ninety years since, the question has been not so much whether government can control business but *which* government will it be, the federal or the state?

---

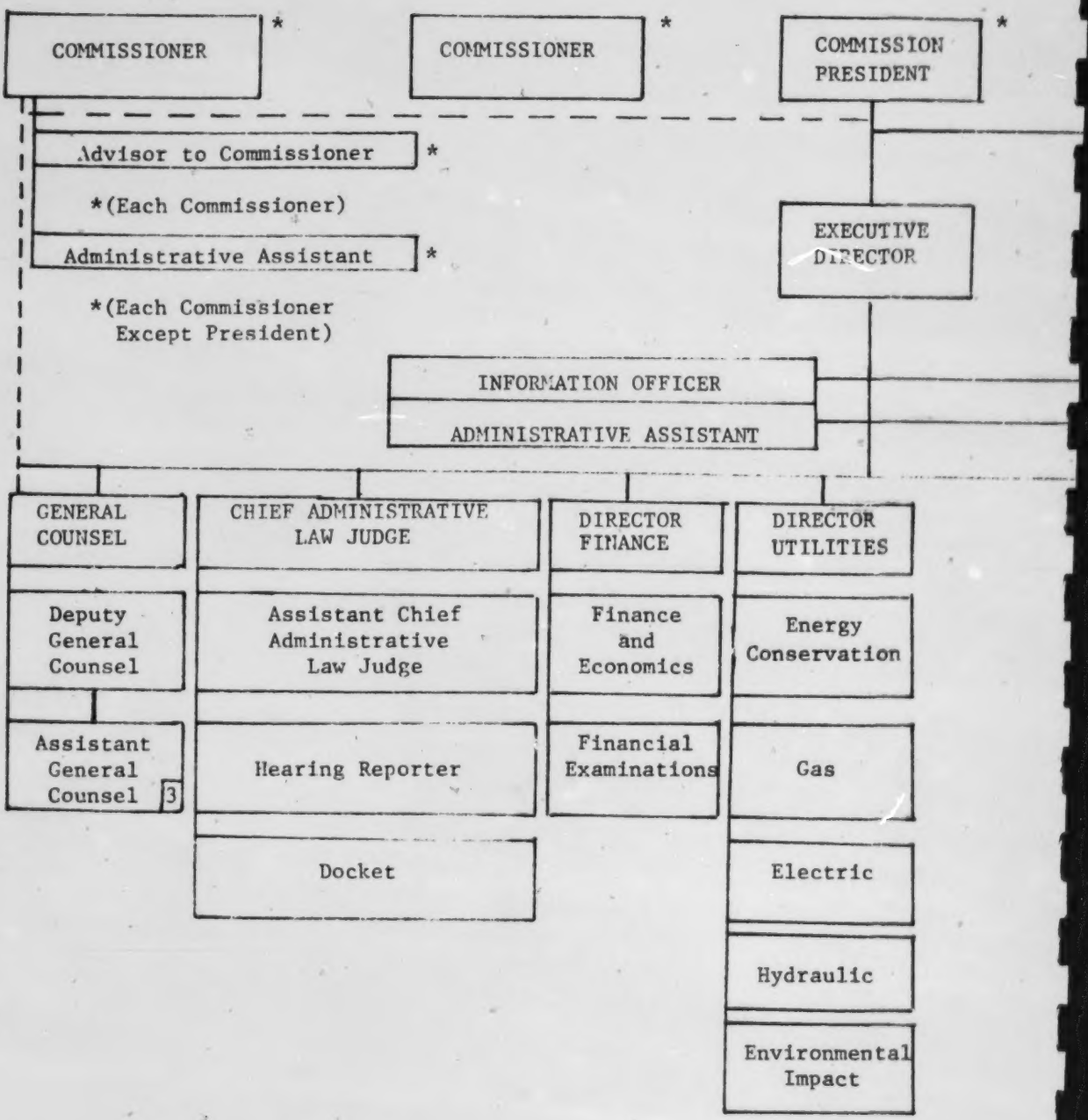
[29]Hughes, p. 4.

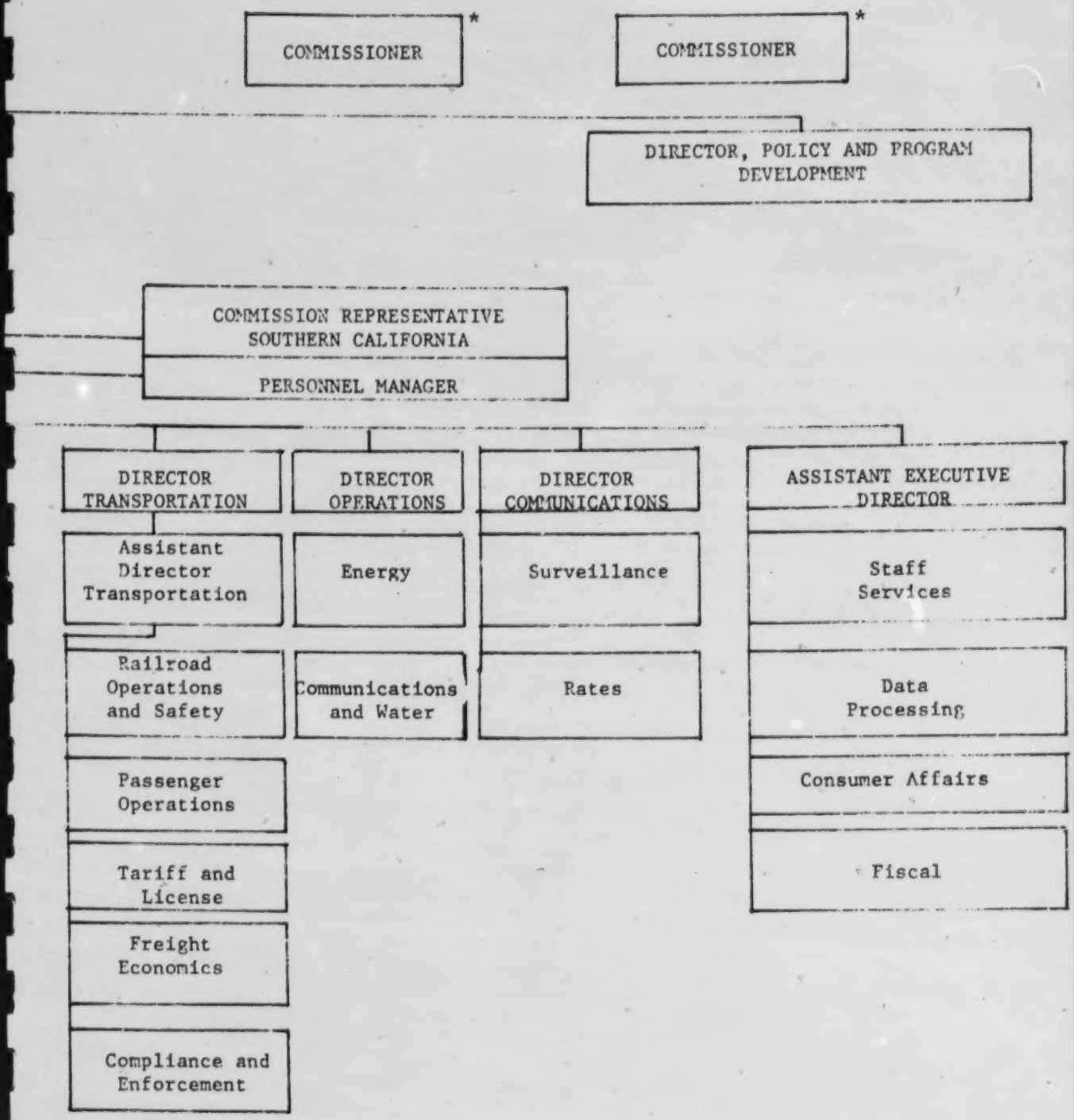
ORGANIZATION CHART

FOR

PUBLIC UTILITIES COMMISSION

STATE OF CALIFORNIA


COMMISSIONER *
COMMISSIONER *
COMMISSION PRESIDENT *
Advisor to Commissioner *
*(Each Commissioner)
Administrative Assistant *
*(Each Commissioner Except President)
EXECUTIVE DIRECTOR
INFORMATION OFFICER
ADMINISTRATIVE ASSISTANT
GENERAL COUNSEL
CHIEF ADMINISTRATIVE LAW JUDGE
DIRECTOR FINANCE
DIRECTOR UTILITIES
Deputy General Counsel
Assistant General Counsel 3
Assistant Chief Administrative Law Judge
Hearing Reporter
Docket
Finance and Economics
Financial Examinations
Energy Conservation
Gas
Electric
Hydraulic
Environmental Impact


COMMISSIONER *
COMMISSIONER *
DIRECTOR, POLICY AND PROGRAM DEVELOPMENT
COMMISSION REPRESENTATIVE SOUTHERN CALIFORNIA
PERSONNEL MANAGER
DIRECTOR TRANSPORTATION
DIRECTOR OPERATIONS
DIRECTOR COMMUNICATIONS
ASSISTANT EXECUTIVE DIRECTOR
Assistant Director Transportation
Energy
Surveillance
Staff Services
Railroad Operations and Safety
Communications and Water
Rates
Data Processing
Passenger Operations
Consumer Affairs
Tariff and License
Fiscal
Freight Economics
Compliance and Enforcement

INSURANCE

No other business group has had such a flirtation with government regulation as the insurance industry. Both state and federal government have striven to please this industry—and often with regulatory inventions peculiar to the insurance industry alone. For example, the insurance industry has been freed, by congressional action, from risk of antitrust prosecution.

Early History

Some knowledge of the history of insurance in the United States is essential to an understanding of the dynamics of government-insurance relations. That history starts with Benjamin Franklin, who is believed to have gotten the first state charter for an insurance enterprise in the New World.

Insuring maritime cargo and vessels was a well-established business in England and a natural for early development in the original states. First insurers were individuals, but needs for more capital and the desire to spread risks soon led to associations of individuals who pooled their funds and shared in the underwritten risks, the profits, and the losses. This form of insurance enterprise is known as a *mutual*. Members share risks, profits, and losses.

The group organized by Franklin formed a mutual insurance company, the Philadelphia Contributorship for the Insurance of Houses from Loss by Fire. It was chartered by the Commonwealth of Pennsylvania in 1752.

Stock companies did not arise until after the War of Independence, having been prohibited by royal decree. Pennsylvania granted the first stock company charter in 1794. That charter, given to the Insurance Company of North America, set limits upon the corporation's activities that are familiar to us today. The corporation could not engage in any other business; real estate investments could not exceed a certain portion of its resources; and it had to have liquid reserves to pay losses.

Regulation by the state thus addressed assets, liquidity, and ability to pay losses, but unlike public utilities, not rates. That has pretty much been the pattern of regulation from then to now.

Insurance companies early became a source of revenue to the states. New York began the practice of taxing premiums in 1824. It is common practice today. For example, the Ohio Insurance Commissioner reports that he turned over to the state treasurer as general revenue more than $100 million in premium taxes in 1976. Such is the relationship between insurance companies and the state in which their headquarters are domiciled that out of state companies are identified as "foreign"

in industry parlance and Lloyds of London as "alien." Often foreign and alien competitors are taxed at a higher rate.

Early state regulation consisted primarily of reporting requirements. By 1819 insurers, viewing competitive rates as unsettling to the industry, began to form local associations, or compacts, to control price competition. John G. Day, in his authoritative *Economic Regulation of Insurance in the United States*, reports that by 1850 the compact system was well established and by 1880 was a working success for its members.[30]

Public resentment against the compact system, which in other industries is called collusive price-fixing, brought on demands for corrective legislation, and many states during the 1880s and 1890s passed anti-compact legislation.

Rise of State Insurance Commissioner's Office

Between 1850 and 1900, a public desire grew to install an expert in government who understood insurance company reports to oversee insurance company operations. New Hampshire had the distinction of acting first. In 1851 it created a full-time board with general responsibility for insurance regulation. In 1869 the board was succeeded by a single commissioner. By that time Massachusetts had already settled on a single commissioner as regulator; that approach soon became the pattern.

Insurance Uniquely Held to be Not Commerce between the States

Only a few years after the Civil War ended, a test case went to the United States Supreme Court, since the Constitution gave the federal government authority over interstate commerce, challenging the power of a state to regulate business between a resident of that state and an insurance business headquartered in another state.

The top court left regulation in state hands by holding that insurance contracts are "not articles of commerce in any proper meaning of the word . . . ." This view—that insurance is not commerce--was reaffirmed by the Supreme Court in 1913. Under these circumstances the state commissioner's role was crucial to an orderly market. At first a state commissioner's power was generally limited to the licensing power. He could deny, refuse to renew, or revoke a company's license to do business in his state; but these life and death powers were circumscribed by statutes specifying

---

[30]John G. Day for the U.S. Department of Transportation, *Economic Regulation of Insurance in the United States* (Washington, D.C.: U.S. Government Printing Office, 1970), p. 8.

grounds on which he could act. Hence, license revocations seldom occurred, and as always, power rarely used became power unrespected. This fact identifies a major defect of licensing of all kinds as a means of policing everyday practices.

Insurance commissioners next gained power to require informal reports and then the right to examine the records of any company under their regulation.

Information led to action, especially during the 1930s, as required reports revealed hazardously low reserve levels, and nervous legislators willingly gave the insurance commissioners responsibility for preventing more business failures.

Now the commissioners usually exercise some control over policy forms, investment policy, mergers, and unfair trade practices. Rate regulation is infrequent, however. Commissioners may require insurance companies to place their rates on file in the commissioner's office, but only in a minority of states and with certain lines of insurance are they required to apply for permission to change their rates.

Two Hundred Years of Exclusive State Jurisdiction

It was the process of establishing rates that led to a showdown between state and federal jurisdiction over the "business of insurance." Only after the United States Supreme Court had rejected federal jurisdiction for the second time, with state legislatures having passed anti-compact acts and with an industry reluctant to compete on rates, did the institution of the rating bureau and associations supervised by the insurance commissioner become common practice.

Day reports, "By 1944 only 12 states continued to rely on anti-compact legislation. Regulation in many states was limited to select lines with varying degrees of legal authority." Eleven states made membership in rating bureaus compulsory for fire insurance companies. "Even where rate regulation was practiced, enforcement tended to be uneven. . .action in concert by companies without effective safeguards became widespread. The interstate character of most insurers' business and jurisdictional limits on individual state regulator's authority compounded the problem."[31]

It was the Attorney General of Missouri who decided to try once again to get a determination that the business of insurance is inter-

---

[31] Day, pp. 22-3.

state commerce subject to the federal antitrust laws. In 1944 he succeeded. The United States Supreme Court by a 4-3 decision reversed previous decisions and held that fire insurance transactions stretching across state lines constitute "commerce among the several states" and that hence, the Sherman Act was enforceable on fire insurance companies restraining competition or monopolizing insurance activities.[32]

Congressional Rejection of Jurisdiction

The federal government responded, but not by taking jurisdiction and acting to enforce the Sherman Act. Instead, the National Association of Insurance Commissioners (NAIC) caused the introduction of the McCarran-Ferguson Act into Congress. Introduced in January 1945, it had passed by March. As Day summarizes,

> Congress opted for state primacy because of the possible dislocation and confusion that might result from the disruption of established regulatory and operating practices and its belief that the states possessed the experience in insurance regulation necessary to regulate "local" industry problems.[33]

By passing the McCarran-Ferguson Act, Congress acknowledged the federal jurisdiction by providing (Sec. 2(b)) that no act of Congress could be construed to invalidate any state statute regulating the business of insurance, unless the Congressional legislation specifically applied to insurance.

Four years later Congress shored up this rejection of their jurisdiction by legislating that the Sherman Act, the Clayton Act, and the Federal Trade Commission Act were to be applied to the business of insurance *to the extent it was not regulated by state law.*

Expressed in its true intent, this legislation said: if insurance companies got themselves regulated by the states on activities covered by these federal acts, they need not concern themselves with possible federal prosecution for unfair trade practices, restraint of trade, or monopoly.

The Association of Insurance Carriers and the National Association of Insurance Commissioners then jointly drafted two model state-rating laws covering fire, inland marine, and casualty-surety underwriting. Primary exclusions were life and health insurance. Rating

---

[32]President Franklin D. Roosevelt had appointed eight of the nine judges who sat on the U.S. Supreme Court at that time.

[33]Day, pp. 24-25.

bureaus and advisory associations were permitted if licensed by a state regulatory authority.

Bureau rates had to be filed, supported by appropriate data, and were open to the public. Any member company desiring to deviate from the rating bureau's rate would have to file a written justification and undergo a hearing.

By 1951 every state had adopted rate regulatory legislation, and the *status quo ante* was reestablished. The situation was as before. The states, not the federal government, regulate interstate commerce when that commerce is the business of insurance.

The exclusion of insurance from federal jurisdiction plays itself out in many curious ways. Whereas other corporations in interstate commerce are now expected by the federal government to conform in their practices to the nondiscrimination laws passed by Congress; insurance companies will be free of that obligation until state insurance commissioners follow the lead of Oregon's insurance commissioner and hold hearings and promulgate rules which define discrimination in rates because of age (except for life and health insurance), sex, marital status, race, color, or national origin as unfair rating discrimination.

Some Commissioners Hear Consumer Voice

Some state insurance commissioners are beginning to hear the voice of the consumer and are finding ways to serve some of their needs—especially for information.

Through a governmental reorganization, Missouri's insurance commissioner office has become the core of a new Department of Consumer Affairs, Regulation, and Licensing (CARL). More than thirty state agencies were combined to comprise the department. Using information on file, the department has compiled a *Consumers Shopping Guide for Automobile Insurance* which contains price comparisons for two hypothetical families in nearly 100 locations in the state, as well as buying tips.

California's insurance commissioner was required by the legislature during the early 1960s to establish a hearing process to resolve grievances filed by consumers against their auto insurance carrier.

Health insurance has been identified as one of the greatest sources of abuse and perhaps has the least scrutiny and regulation from the commissioners. Wisconsin's Insurance Department has progressed from a previous commissioner's policy of educating the consumers to the pitfalls in many of the Medicare supplementary policies

to a policy under the present one of protection from deceit by ruling off the market the most worthless ones.

In announcing the new administrative rules, Wisconsin's Commissioner Wilde said, "Government has been and continues to be part of the problem. We have too long acquiesced in practices which are morally indefensible." Pointing to the fact that Medicare is a federal program with "gaps and gaping holes" in it, Wilde said,

> . . . This is a nationwide problem . . . . I believe that—in the absence of a concerted national effort by the insurance industry—federal action will be required to clean it up.[34]

In most states "the Blues," Blue Cross and Blue Shield, have gained exemption through legislative action from surveillance by the insurance commissioner. Pennsylvania and New York are among the exceptions. In Pennsylvania the Insurance Commissioner must approve Blue Cross hospital rate increases before they can become effective.

---

[34]*The Milwaukee Journal*, December 15, 1977.

PART V

USE OF THE POLICE POWER TO PROTECT THE PUBLIC HEALTH AND SAFETY

PUBLIC HEALTH

"Public health and safety," perhaps second only to "national security," is an accepted purpose and justification for society to make rules all citizens are expected to observe. In fact, the police power of government rests largely on the need for government to be empowered to protect the public health and safety. Some variation of the phrase, "to protect and promote public health and safety," occupies a line in the preamble of many legislative enactments and administrative regulations, establishing for possible court review the legislative purpose to be served by the enactment.

One of the very first communal actions after even a temporary encampment of a few people is to decide how to insure a safe water supply, arrange necessary waste disposal, and prevent the spread of disease. It is easy to imagine that probably one of the first public policy decisions after the *Mayflower* landed was where the bathing would be done.

A water supply system is either operated by a local government or supervised by one. Most often the decision is for public ownership and operation. This choice is premised partially on consideration of public health and partially on public safety (so the fire department will have adequate fire fighting potential).

It is not surprising that one of the departments of local government is the department of public health. So, it can be useful to look at some of the characteristic consumer services local public health departments have provided and how they are changing before we explore the broader and more abstract import of government's use of the police power to protect the public health and safety.

City and County Public Health Departments

Characteristically until recent times both counties and cities have had public health departments. These departments generally have sanitarians who are concerned with seepage of contaminating wastes, waste disposal, and whether structures are fit for human habitation.

Because of this sort of health concern, plumbers are often licensed by local government. In recent years local government, which is generally the level of government which sets and enforces building codes, has adopted housing codes governing the uses to which housing may be put and set out specifications that housing must meet before it may be considered habitable. Housing codes are basic health protection measures, especially benefiting renters of old and deteriorating housing; in other words, the poor. Unfortunately, tardy and weak enforcement too often negates much of the value of housing codes.

County health departments are responsible for registering births and deaths wich occur within their area and may license midwives and funeral establishments, as well as issue burial permits.

Milk—a Special Focus of Public Health Officials

Local public health departments can use their police power to quarantine the occupants of a house where there is communicable disease. In an earlier day, they were in the forefront of the movement to outlaw the sale of raw milk and took responsibility for inspection of milk sold within their borders.

Milk was the focus of much early local government health regulation. The practice grew up naturally. As milk was brought into the town for sale, it was a concern of consumers whether it was safe to give to a baby. A consumer could not determine this with sufficient certainty by inspection alone. Thus, the job of the public health inspector originated, and to backstop the inspector came the public health laboratory.

By 1924 public health officers had perfected, to their satisfaction, a model pasteurization ordinance and obtained its first adoption by a public jurisdiction. Designed by and for local government in the form of an ordinance, it was much later before state governments adopted it to cover the gaps between local jurisdictions. This ordinance requires the pasteurization of all fluid milk and cream offered for sale. By the adoption of this ordinance at city, county, and state levels, the selling of raw milk products for human consumption is effectively prohibited in the United States. Wisconsin, "America's Dairyland," did not adopt the provisions of the pasteurization ordinance as state legislation enforceable by state inspectors until 1957. That year the legislature made pasteurization of all Grade A (fluid) milk mandatory.

In addition to requiring pasteurization, it is generally accepted that the health of the cows on the farm and the cleanliness of the barn and milk house are proper concerns of consumer protection officials since consumers are helpless to protect themselves. Hence, publicly employed inspectors can be seen traveling to farms and milk holding stations every working day.

As one interesting instance, the city of Chicago in its vigilance has for many years had about ten milk inspectors stationed full time in the state of Wisconsin. They and other inspectors who commuted from Illinois inspected 9,000 Wisconsin dairy farms, 53 transfer and receiving stations, and 5 pasteurization plants which sell some milk in Chicago. The Wisconsin Department of Agriculture inspects about 12,500 other farms.

In 1977 after a long court fight, the federal courts ruled that since the milk was in interstate commerce, so long as it met FDA standards, Chicago could not block its entry into that city's markets on the grounds that the farm of origin had not been inspected by city authorities. As a result, beginning January 1978, Chicago taxpayers are being saved several hundred thousand dollars per year. The Wisconsin state legislature appropriated $312,000 for the increased inspection load and authorized eighteen more inspectors to be hired. User taxes, or charges upon the dairy farms and processors, will recover about half of that amount according to a department administrator. Chicago will continue to inspect milk after its arrival in the city.

Consumers have little knowledge of—or, seemingly, interest in—the procedures taken to safeguard their milk supply; whether they are all necessary, or the most useful that might be applied, or whether they are efficiently employed. Merely from the standpoint of public health, regulation is a complex of city, county, state, and federal programs. From the standpoint of marketing practices and price supports, regulation is even more of a maze.

Other traditional functions of local health departments include inspection of food businesses, such as delicatessens, back rooms of supermarkets, restaurants, and taverns, to protect customers from unclean premises or equipment or from contaminated food. The Public Health Department in New York City publicizes the names of restaurants found in violation, making the threat of adverse publicity an incentive to compliance.

Change in Services of Local Public Health Agencies

As the change in Chicago's milk inspection program suggests, the work of public health agencies in city and county government is shifting. Vaccines, antibiotics, and new treatment methods have practically eliminated diptheria, smallpox, and many other quarantinable diseases. The county tuberculosis institutions are closed for lack of patients. As a measure of the change, one of the new responsibilities of Milwaukee's Public Health Officers is to consider and rule whether, when the utility company cuts off services to a home during the cold northern winter, that will endanger an ill or aged occupant.

The medical care professions and the private hospitals have taken care in recent decades to rule out the local public health departments from direct delivery of health care services to individuals except for occasional services, such as vaccinations, inoculations, and well-baby clinics. Most former county hospitals have been closed or converted to private practice institutions. As the poor became eligible for Medicaid and physicians and hospitals were able to bill the government for serving them, the health care industry entered upon a successful public education program to "eliminate second-class medical care" which led to closing down many hospitals and clinics being operated by local government. There are exceptions, of course, such as Cook County Hospital in Chicago.[35]

State government, which funds and oversees many of the health services of counties, has in recent decades advocated merger of city and county health departments; a move resisted by the incumbent officers and viewed with indifference by local consumers and taxpayers.

Their professional colleagues in the private sector react to public health workers with a conscious design of keeping them "in their place" and are more concerned about what they should not do than what they could do. Over time, with the conquest of tuberculosis and infantile paralysis and many other fearful communicable diseases, the local health agencies have lost their citizen constituency. They are not being invoked by their public to tackle the community health problems of today, such as alcoholism, drug abuse, venereal disease, obesity, diabetes, and high blood pressure, with the same zeal they were encouraged to undertake preventive programs in an earlier day.

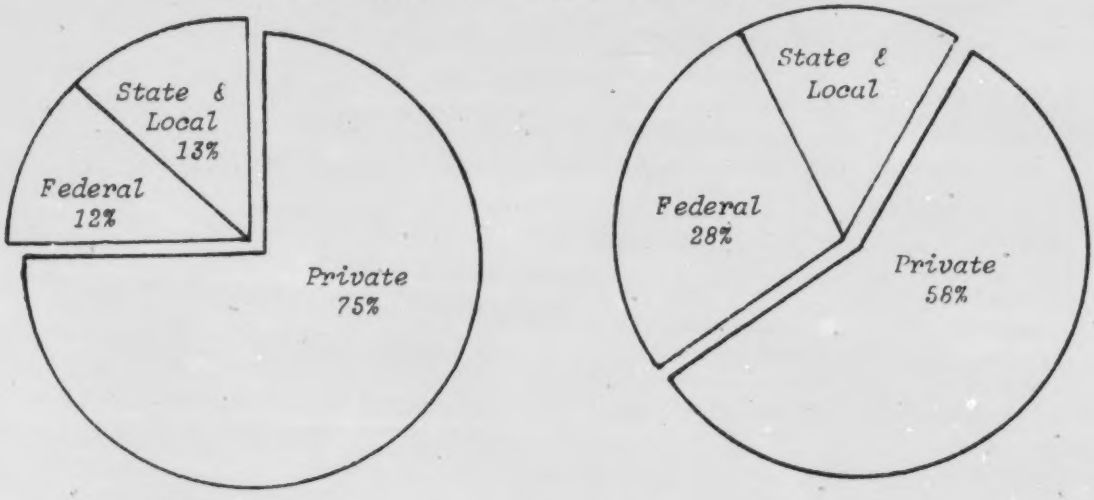
It can be noted from the above brief description that the local health department's activities have been largely preventive. It is probably reasonable to say that most of the governmental effort toward prevention of death and disease in the last century has been carried on at the local level.

Couple with this observation the recent statement that of the 140 billion dollars recently spent in a year on "health care" in the United States (this amount is more than was spent on national defense), only 2 percent was spent on prevention. Treatment took 94 percent and research 4 percent. Can there be some connection between the eclipse of the local public health leadership and the lack of preventive programs in the nation?

---

[35]And even Cook County Hospital is "fighting against what has now become the perennial specter of a shut down . . ." according to a report by David Moberg in *In These Times*, April 12-18, 1978, p. 3.

PUBLIC AND PRIVATE HEALTH EXPENDITURES



Fiscal Year 1965 $38.9 Billion

Fiscal Year 1975 $118.5 Billion

Source: Office of Technology Assessment, *OTA Health Program Plan-Fiscal Year 1978* (November 4,1978): p.]3.

Can Consumers Participate in Health Care Planning on the State and Local Level?

Although spending for health care increased dramatically in the last ten years, the share of expenses born by state and local government has remained just about the same: 13 percent in 1965 and 14 percent in 1975.

At the state level, health protection agencies are often scattered among departments. The functions the U.S. Food and Drug Administration performs in overseeing the safety—and sometimes the efficacy—of foods, drugs, cosmetics, and medical devices are frequently divided up at the state level between departments of agriculture, commerce, and health—if there even is a department of health. A very important function performed at the state level is the licensing and supervision of nursing homes.

The majority of health care expenditures are paid privately, by consumers and employers, though the proportion of all health expenditures financed this way has declined. At the same time the federal government's financial participation has more than doubled.

Some of these federal funds are available locally and can be directed by alert consumer groups and individuals to provide both needed services and better health care planning.

Preventive Health Care for Youngsters from Low-Income Families

Federal funds are available at the local level to provide preventive health care such as immunizations, vaccinations, and checkups for younger members of low-income families. Yet, if Milwaukee is any criterion, little advantage is being taken of this opportunity. In the most recent year reported, only about one in eight of the children eligible received preventive health care. Is the program faulty in design? Is its availability insufficiently known? Do consumers express concern to the local agency in charge?

Health Maintenance Organizations

As the federal government strives to get some leverage on rising medical care costs—costs which have increased more than any other component of the Consumer Price Index—officials search for ways to empower and motivate consumers to apply the brakes locally. They currently have two stratagems. One is to help local consumer and health care groups create a form of delivery of health care called health maintenance organizations, or HMOs. An important characteristic of such an organization is the enrollment of consumers whose care is paid for in advance by a predetermined monthly payment and delivered by a group of physicians and health care workers working in concert to serve the enrolled consumers with nearly total health care. There were recently fifty HMOs which had met the federal government's qualifying standards, which include that at least one-third of the board of directors be consumers of the service.

Evidence is accumulating that this approach to health care delivery, originally called prepaid group practice, holds down medical care costs by removing any financial incentive to provide unnecessary medical treatment and eliminating much paperwork which inevitably accompanies "fee-for-service" delivery systems. Moreover, it provides both the incentive and the means for consumer and health care providers alike to focus on wellness and health care instead of on sickness and medical treatment.

Health Service Agencies

The other stratagem the federal government has to enable and motivate consumers to brake escalating medical costs at the local level is the health service agency program. States have been required by the federal HEW to partition their population into service areas which are, as nearly as possible, natural economic areas with

each area having a health service agency; the majority of whose directors must be consumers, not providers, of medical care. The nation thus has been divided into 287 service areas. The area health service agency must approve any expenditure by a hospital for capital equipment or facilities costing $100,000 or more in order for the hospital to get Medicare and Medicaid reimbursement for the charges on that equipment or facility. It is the hope of the federal government that the agency representing the large community of consumers and taxpayers will be able to slow the overexpansion of facilities and curb the desire of a hospital to provide every kind of service and have every kind of equipment. Denials by the health service agency can be appealed to a state health service agency and from there to HEW.

This recent program has brought together thousands of community members from across the country to serve as officially designated consumers at the local level deciding how tax and private medical care dollars can be spent.

It has seemed worthwhile to discuss health care and how consumers can participate locally in its planning at some length because of the great importance of health care in the family budget and as a major factor in our inflation rate.

However, state and local governments carry on many other activities as they exercise their police power to protect health and safety. Patrolling the state highways and the city streets to reduce the risk of injury and to assist those who have been injured is one such major activity. The protection of the public health and safety includes such differing governmental functions as enacting building codes and requiring permits for a parade. Another major use of police power to protect health and safety is occupational licensing.

OCCUPATIONAL LICENSING

It would be difficult to find evidence of widespread public demand for licensing an occupation. The demand comes from the practitioners already in the occupation. Of course, they would be the best informed about the unfit among their group; but for good constitutional reasons when an occupation is newly granted licensure by the legislature, all practitioners at the time are "blanketed in." To deny any one of the practitioners the right to continue in practice of the occupation would be deprivation of property without due process and, therefore, illegal and unenforceable. So the very passage of licensing legislation gives government sanction to incompetents and quacks if there are any practicing the occupation at the time. Those *blanketed in* at the outset of licensure come to be designated as having been *grandfathered in*.

After licensure is enacted, every new entrant must clear whatever hurdles are constructed by the licensing agency of the government. At the state level that agency is usually a board of several persons, all or the great majority of whom are practitioners of the occupation being licensed.

In addition to the power of exclusion, the board has the power to revoke or suspend a license, a power so great and with consequences so drastic that board members are exceedingly reluctant to exercise it and courts are vigilant to scrutinize their action for *due process* and *just cause* if asked to do so. This circumstance causes some observers to conclude, "Once licensed, home free."

The attractions of licensing to practitioners of the occupation licensed are obvious, and so the number of occupations requiring state licenses has grown with almost every legislative session.

As an example, Wisconsin, a state of about 4.5 million people, has under its Department of Regulation and Licensing the following licensing boards:

Accounting Examining Board
Architects, Professional Engineers, Designers and Land Surveyors Examining Board
Athletic Examining Board
Barbers Examining Board
Chiropractic Examining Board
Cosmetology Examining Board
Dentistry Examining Board
Funeral Directors and Embalmers Examining Board
Hearing Aid Dealers & Fitters Examining Board
Medical Examining Board
    Physical Therapists Examining Council
    Podiatrists Examining Council
Board of Nursing
    Examining Council of Registered Nurses
    Examining Council on Licensed Practical Nurses
Nursing Home Administrator Examining Board
Optometry Examining Board
Pharmacy Examining Board
Pharmacy Internship Board
Psychology Examining Board
Real Estate Examining Board
Veterinary Examining Board
Watchmaking Examining Board

Most of these boards include one public consumer member. The other members come from the occupation licensed.

One should not lose sight of the fact that in addition to those occupations licensed by occupational examining boards, there are many

other occupations and businesses of whom a license or registration is required by an administrative agency of state government.

Take Wisconsin again as an example:

The Department of Agriculture, Trade and Consumer Protection licenses limburger cheesemakers, livestock dealers, livestock truckers, Grade A milk distributors, and requires that other businesses such as mobile slaughterers and auto repair establishments merely register with the department.

The Department of Natural Resources licenses wholesale fish dealers, bait dealers, taxidermists, and fur farms.

In fact, many more occupations and businesses are licensed by administrative agencies than by licensing boards. A directory of occupations licensed by the state of Wisconsin in 1975 included over 200 listings.

In addition, local governments in Wisconsin are delegated specific licensing responsibilities by the state. Local governments must or may license, among others, taxicab operators, used car dealers, bartenders, electrical contractors, restaurants, theaters, and trailer courts.

It has been estimated that, at least in California, one in every ten persons employed (including self-employment) is in a licensed occupation or profession—in other words, needs a license from the government to earn a living.

The term *licensed* signifies authorization from government—legitimacy. In contrast, *registered* or *certified* connotes recognition but not authorization.

Licensing is defined by the Council of State Governments as "the granting by some competent authority of a right or permission to carry on a business or do an act which would otherwise be illegal."

Since we had established the right of government to use its police power to protect the public health and safety three centuries ago, we might expect that licensing of physicians and health care occupations started with the first book of laws in Pennsylvania in the seventeenth century. Not so. Licensing of tavern keepers started much sooner than licensing of physicians. As the classic text on the subject tells us, "it was not until the early 1900s that a significant number of licensing laws relating to the health occupations were enacted."[36] A large part of the reason may be that during most

---

[36] *Occupational Licensing : Practices and Policies*, Shimberg, Esser, and Kruger, Public Affairs Press, Washington, D.C., 1973.

of that time "medicine" was not a profession. It was practiced by plantation owners, ministers, barbers, mothers, grandmothers, and avowed quacks. It was to deter the quacks that licensing was proposed in the beginning of this century.

The use of licensing to deter the avowed quack—the con man—has been extended to deterring the incompetent, the unschooled, and the too numerous.

The way occupations gain their own licensing board has been realistically described by Shimberg, Esser, and Kruger in their book, *Occupational Licensing . Practices and Policies :*

> Although the rhetoric of licensing places much emphasis on protecting the public health and safety, in practice the public has little to say about enacting licensing legislation. The sponsoring group usually drafts the legislation and then has it introduced by a friendly legislator. Members and friends participate in an organized letter-writing campaign to support the legislation; practitioners and paid lobbyists call on legislators in person to obtain commitments for the law. When the hearings are held, expert witnesses can be summoned to lend their prestige and technical knowledge to the legislative effort. The public is all but forgotten. Concerned citizens who may be opposed to the legislation rarely have the financial resources to initiate a counter-campaign. Thus, legislators are likely to hear only one side of the issue and to mistake a lack of opposition for tacit assent on the part of the public.
>
> Without any formalized criteria to guide decisions related to what should or should not be licensed, a legislator is at a serious disadvantage when called upon to decide about any group seeking licensure. On what basis can he vote for the licensing of one group and against the licensing of another?[37]

The states are searching for better solutions than licensing boards or for ways of making licensing boards better solutions. Some states have voted a moratorium on creating new licensing boards while searching for an alternative more responsive to the community.

California, as has been mentioned, has a majority of public members (nonmembers of the licensed group) on most of its licensing boards.

---

[37]Shimberg, Esser, and Kruger.

Colorado's legislature has approached the problem of occupational licensing by passing "sunset laws" specifying future dates when designated boards will have to gain a new legislative lease on life or go out of existence. It is too early to evaluate the results.

In 1976 Wisconsin's Legislative Council undertook a well-staffed one-year study of "issues related to the independent licensing boards attached to the Department of Regulation and Licensing and to the regulation of attorneys." Members of the legislature and citizens served on the study committee.

The thoroughness of the study and the thoughtfulness of the ensuing report have attracted national attention to its recommendations. For this reason its recommendations are set forth here in some detail, though none has gained passage to date.

First, the committee established criteria for licensing. It unanimously agreed that only when an occupational group meets all of the following four criteria should it be licensed by the state:

1. Their unregulated practice can clearly harm or endanger the health, safety, and welfare of the public and when the potential for such harm is easily recognizable and not remote or dependent upon tenuous argument;

2. The public needs, and will benefit by, an assurance of initial and continuing professional and occupational ability;

3. The public cannot be effectively protected by other means; and

4. It can be demonstrated that occupational licensing would be the most appropriate form of regulation.

Second, a bill was drafted expressing the recommendations of the study group. It called for:

1. Elimination of the hearing aid dealers and the watchmakers boards and an end to specialized regulation of these two occupations. The vendors of these two services would thus join the majority of vendors who are subject to the general laws governing retail sales and services between vendors and consumers. Hearing aid dealers would merely register with the Department of Regulation and Licensing.

2. Continuing regulation of the remaining occupations, some with, some without examining boards.

a. Those occupations whose own examining boards were to be eliminated and regulation administered directly by the Department of Regulation and Licensing were:

Accounting
Athletic
Barbers
Cosmetology
Funeral Directors and Embalmers
Nursing Home Administrators
Real Estate

b. Those occupations whose own examining boards would continue were:

Architects, Professional Engineers and Designers (Land Surveyors which have been part of this group would join the prior group in being licensed directly by the Department.)
Chiropractic
Dentistry
Medical
Optometry
Pharmacy
Psychology
Veterinary

The tendency of the medical-related boards to spawn subboards, or *councils*, would be curbed with the elimination of the physical therapist's examining council and the podiatrist's examining council under the medical board; and of the registered nurses examining council and the licensed practical nurses examining council under the board of nursing. The responsibility for these occupational subgroups would be placed directly on the examining boards.

Following the same logic, the bill calls for the elimination of the pharmacy internship board and the transfer of its regulatory authority to the pharmacy board itself.

3. For those occupations continuing to have their own licensing boards, a second citizen member would replace a member of the profession.

4. The boards which are retained would lose some of their independent authority by creation of an Occupational Standards Board with rulemaking and review authority over decisions affecting licenses.

5. A uniform policy would be established for general areas such as character assessment, advertising, citizenship requirements, and conflict of interest.

The bill was introduced in the 1977 session of the Wisconsin legislature as Assembly Bill 784 and was, to borrow an expression, stopped at the line of scrimmage when the opposition's entire defense team fell upon it with all their might.

The potential beneficiaries of its passage, consumers and young persons wishing to enter a licensed profession; were busy, uninformed, and without the organization necessary to support their legislative proponents effectively.

Debate on Budget B
Owner-Renter Stud

By Charles E. Friederich
Journal Madison Bureau

Madison, Wis. — Representatives of the real estate industry opposed a proposed study of landlord-tenant problems Tuesday as the Legislature's Finance Committee began three weeks of deliberations on Acting Gov. Schreiber's budget review bill.

Other subjects discussed Tuesday were proposed pay raises for some state officials and a controversial nurses'

Health Facilities on Rules Agenc

Journal Madison Bureau

Madison, Wis. — Various state agencies have scheduled hearings in March on proposed rules for carrying out laws they administer.

Among the subjects involved are planning standards for certificates of need for health facilities, definitions for various exemptions from the sales tax, boating regulations on the St. Croix River and refresher courses when a delay occurs between work and driving.

rings are in the strative es hear- less re- ys. les have

To consider the adop relative to administr dures for certificate of March 14, Wisconsin C son.

Transportati

To consider adoption ative to allowing certai tors to exceed the 1 steering axle weight rated tire capacity of la tires with a heavier pl used; 10 a.m. March 1 State Office Building, M

Industry, Labo and Human Rela

Ind 52.60, flushing urinals, no hearing unl ed.

Insurance Commis

Ins 12.01, insuran companies and intercorp actions relating to insur ing held in January was that the time of the hear indicated; amendment Wisconsin holding com and rules into closer with National Associatio ance Commissioners mo company laws and requ

Legislative SCOREBOARD

A Legislative Sampling

Major Laws in the Making	*Status and Outlook*
udget Review .(A-1220) Acting Gov. chreiber's proposals for revisions in the state udget, including ways of allocating state sur- us.	Joint Finance Committ sembly. Schreiber's ta doomed, income tax stead.
ccupational Licensing (S-664) Revis- state laws on the licensing of occupations, olishes some existing examining boards,	Sent to committee by S haps dooming it for house has yet taken it u

Capital CAPSU

Journal Madison Bureau, AP

Madison, Wis. — All lawyers in private practice

State Judicial Council ly because of the e ment of appellate c

Mental Health, PSC Due for Hearings

Journal Madison Bureau

dison, Wis. — Prohibi- on the sale of cleaning s containing high levels osphorus, a restructur- f the Public Service mission into a Public gy Commission and es in the mental health e among the topics to scussed this week by ittees of the Legisla-

o on the hearing agenda ontinuing hearings into udget review bill, in- tax refunds, initiative- ndum, hearing examin-

Senate Education and Revenue, Sullivan School, Green Bay, 2 p.m. — Discussing need for secondary vocational education in northeastern Wisconsin.

Tuesday

Assembly Judiciary, Room 314 Northwest, 12:45 p.m. — S-509, authorizing a court to place assets in a trust for a minor until he or she reaches 18 or 21; A-1240, revising municipal court procedure.

Senate Natural Resources and Tourism, Room 314 Southeast, 1 p.m. — Appointing Carmen Hanson, Beaver Dam, and John Soder-

THE

rolls; A-851, requiring county clerk to act as county auditor unless board creates a separate office; A-792, relating to composition of municipal boards of canvassers for municipal elections; A-720, providing that an appointed town assessor need not be an e A-678, relating in county execu increasing mem Affairs Council.

Wed

Senate Huma 314 Southeast, providing state care for pers committed unde S-669, providing family practice S-698, authorizi cial Services D prove limited u private domesti come tax; Senate Joint Resolution 53, asking Congress to investigat grain market and monopolies.

Thursday

Assembly Insurance and Banking Room 318 Southwest, 1 p.m. — A

HOW WISCONSIN CONGRESSM VOTED

In the House . .

PART VI

USE OF THE POLICE POWER TO MAINTAIN LAW AND ORDER IN THE MARKETPLACE

Just as traffic on the streets and highways is subject to laws made to establish rights of drivers *vis-a-vis* each other and to maintain orderly movement, traffic in the exchange of goods and services is subject to laws made to establish rights of buyers and sellers *vis-a-vis* each other and to maintain orderly markets.

Just as traffic on the streets and highways is patrolled by law enforcement officers, traffic in the exchange of goods and services is patrolled by law enforcement officers. It is primarily state and local law and law enforcement officers that govern both kinds of traffic.

Drivers have recourse to the civil courts for final determination of a claim of one against another. So do buyer and seller. Likewise, drivers are subject to fines and penalties provided in the governing laws for acts of violation. So are buyers and sellers.

Society makes the rules of the road for both types of traffic—who has the right of way at an intersection? and what is the speed limit? who has a right to his money back? and how short can legal net weight be?

A market economy presupposes that buyer and seller deal with each other as equals, as peers. This equitable relationship should follow all the way through the distribution channels.

In the original states, the Virginia plantation owner bought from and sold to the sea captain. They bargained as equals, perhaps over a glass of port.

A professor of political economy at Columbia Graduate School of Business, Dr. Irston Barnes, expressed it well:

> Integrity of markets cannot be preserved unless all buyers and sellers have a right of equal access to the market. Equal access to the market means a full knowledge

of all relevant facts with respect to price, quality, and other significant dimensions of market transactions.

Of course, it is government and only government that establishes rights of equal access.

For example, in its concern for the farmers' rights of access equal to those of large grain and cotton buyers, the government established public weighmasters, market news services, product research facilities, and technical consultants available locally in the form of county agents. County roads were built and maintained to enable farmers to have access to more distant markets. Farmers' cooperatives were encouraged by government, and a federal law (the Capper-Volstead Act) exempted farmers who joined together to market their crops from prosecution under the antitrust laws. These and other solicitous acts of government are all geared to raising the farmer as a seller to a more nearly peer relationship with the buyer.

Government has also taken steps to improve the farmers position as a buyer. It is common, especially in states with a sizable agricultural sector, to find state laws regulating the sellers of seeds and fertilizers and pesticides and requiring disclosure of nutrient values in formulated animal feeds in order that the farmer can enter the marketplace as a buyer with some assurance of being able to bargain effectively. Government's effort to elevate the farmer to a peer bargaining position is by no means the only such effort by government.

Over the last decade, one state after another has adopted the painstakingly drafted Uniform Commercial Credit Code. This code, brought to state legislators by the National Commission on Uniform State Laws, is an outstanding example of government setting down in law the rights and responsibilities of commercial businesses dealing with each other as peers in credit transactions. Among other provisions it establishes that a transaction is a contract enforceable in the courts unless its terms are unconscionable.

A recent example of the use of this code received nationwide attention when Westinghouse voided its promise to deliver specified amounts of uranium to a group of public utilities at a specified price. When the utilities went to court to gain court enforcement of their contract with Westinghouse, Westinghouse asked for the protection of the unconscionable clause in the Uniform Commercial Code, arguing that the price originally contracted was too low in today's market and it would be unconscionable to require them to fulfill the contract.

The Uniform Commercial Credit Code is only one example of many. There is a whole body of business and commercial law establishing equitable and peer relations between commercial buyers and sellers.

Besides relating to each other on a solid base of law with resort to the courts always possible, the commercial buyers and sellers have ready recourse to arbitration for the speedy and final resolution of disputes between them. The American Arbitration Association has offices in every major city and makes its services available to businesses wherever they are needed.

Both buyers and sellers have time-honored rights. For example, it is the *seller's right* to enter the market—the right of free entry. It is also the seller's right to set the price at that which he is willing to sell. As we have seen, the courts have been vigilant to protect these rights from government dictation except where the public interest necessitates regulation.

It is the *buyer's right* to examine and compare the product offered, to compare prices, to name the quantity he will buy—and to get what he pays for. These are ancient and traditional rights a society dedicated to a free market economy strives to preserve.

It is the open entry for sellers to join in the competition of the marketplace, to decide what they will sell and set their own price that we take pride in as we talk about "the American way of life" and "free enterprise."

Yet, we find a need for rules in the competitive game. In fact, we have found that rules are needed to stimulate competition. Zest to compete is not always characteristic of sellers, especially zest to compete on the basis of price.

Over a hundred years ago, the Grangers were pointing out to whatever government would listen that all of their suppliers of a particular product were charging the same high price. The governmental response at the federal level was to enact the Sherman Antitrust Act, requiring in effect competitive companies to compete and not form alliances and compacts "in restraint of trade"—that is,

engage in price fixing. Many states enacted similar laws, saying in effect to competitive enterprises, "You shall compete." These laws are usually enforced, when they are, by the state attorney generals.

Some decades later, after many small entrepreneurs complained to government of ruthless and unprincipled competition which threatened their existence, the Clayton Act was passed by the federal government, laying down the law against engaging "in unfair trade practices." The Federal Trade Commission was created at that time—1914—to enforce the new law against unfair trade practices. Many states followed suit, passing "mini-FTC laws."

These two laws, addressing sellers' behavior, are generally considered complementary to each other. They depict the two basic approaches to ordering desirable marketplace practices. One is "Thou shall"; the other, "Thou shall not." The first gives the competitors a mandate or requires a certain performance. The other identifies what conduct is proscribed or not allowed. Both generally set penalties for violations.

The buyer's right to examine and compare products offered, to compare prices, to name the quantity of the purchase, and to get what is paid for are reinforced by both law and government programs. The United States Department of Agriculture and many state agriculture departments work to establish and preserve the integrity of the market in basic farm products. As a national food manufacturer buys his raw materials from the grower, for instance, he can exercise the buyer's traditional right to examine the product and compare prices. He can specify the quantity he wants. He may exercise these buyer's rights without ever leaving his office. He buys by government-supervised quality grade. He avails himself of the government maintained daily market information on supply and price in the major markets of the country. He generates the order, puts his own specifications in it, and gets an invoice from the seller that is enforceable upon the seller. He buys by contract on an equal legal basis with the seller and equally informed.

When, however, the buyer is a United States consumer, the circumstances are regrettably different. Quality designation which accompanies a product when it leaves the farm, and which accompanies it as it changes hands all the way down the distribution channels, is removed or concealed before the product is presented to the ultimate buyer, the consumer. With most of their purchases, consumers cannot examine and compare the products offered.

Nor can consumers compare prices of even common food items such as cheese and breakfast cereals, not to mention life insurance and health insurance.

Consumers have been fighting a rear guard battle against the loss of these essential rights. Truth-in-lending laws have restored to consumers the ability to compare the prices of borrowed money. Unit pricing laws in a few states have partially restored consumer rights to compare prices in the supermarket.

To get what he paid for, the commercial buyer has his invoice as a contract enforceable in court. If it is a credit transaction, he has the protections of the Uniform Commercial Credit Code. He has access to speedy arbitration.

The consumer, as a practical matter, has none of these recourses in the United States. In England, by contrast, a consumer's purchase of goods in a market is a contract. If the retailer does not fulfill the contract, the consumer may go to court on his own and be awarded proper redress. The loser pays the court costs.

In this country we have not firmly achieved the principle that a sale to a consumer is a contract. When the buyer is the ultimate buyer—a consumer—most times the sale is something less than a contract.

While the buyer's rights of those who enter the marketing channels earlier than the consumer are being zealously preserved, the consumer's rights as a buyer are being eroded.

Yet, theoretically, the consumer in a free market economy controls and directs that economy by his purchases, by his choices among competing offerings. Consumer spending in our economy accounts for two-thirds of the gross national product. Not only is the dignity of the individual in our society threatened by the collapse of any capacity to function knowingly in the buyer's role. The major part of our market economy faces gross inefficiencies and a corruption of values unless we can restore and uphold the rights of individuals as buyers no less than the rights of corporations, business owners, and farmers as buyers.

PART VII

CONCLUSION

Adolf Berle in the early 60s wrote, with the exuberant spirit of those times, *The American Economic Republic*. In his preface he said,

> Despite classical economic theory, American society is not being used by, but, rather, uses, the profit-seeking market-enterprise system, and certainly is not governed by it. Private enterprise in the United States is thus essentially an instrument of the state, not, as was formerly believed (perhaps accurately), an end for which the state exists.
>
> It has not produced a perfect society or anything approximating this. But it has laid a material base from which social progress can build as far and as fast as American imagination and the consensus of American public opinion chooses.[38]

He concedes that there was one period when concentration did become dangerous--the decades beginning in 1870 and ending in 1910—but that "American political reaction was quite sufficient to prevent the great corporations which were predominant in production from becoming masters of the state."[39]

A large part of that "American political reaction" was the organized voice of the National Grange—farmers, low-income families, and small entrepreneurs—who insisted that governments, local, state, and federal, right the imbalance in bargaining position between them and those with whom they were dealing. Governments responded and, if Berle is right, corrected a threatening economic concentration.

Perhaps there is a parallel today. Perhaps the consumer movement in the 1970s represents the counterpart of the Grangers in the 1870s. There is little doubt such a counterpart is needed today.

---

[38]Adolf A. Berle, *The American Economic Republic* (New York: Harcourt, Brace & World, Inc., 1965), p. x.

[39]Berle, p. 13.

RECOMMENDED READING

Adrian, Charles R. State and Local Governments, Fourth edition. New York: McGraw-Hill, 1976.

Barnes, Peter. "The Sharing of Land and Resources in America." New Republic: Summer issues of 1973.

Belden, Joe, and Forte, Gregg. Toward a National Food Policy. Washington, D.C.: Exploratory Project for Economic Alternatives, 1976.

Berle, Adolph A. The American Economic Republic. New York: Harcourt, Brace & World, 1965.

Blair, John M. Economic Concentration: Structure, Behavior and Public Policy. Harcourt Brace Jovanovich, 1972.

Bonbright, James Cummings. Principles of Public Utility Rates. New York: Columbia University Press, 1961.

Boorstin, Daniel J. The Americans: The Colonial Experience. New York: Vintage Books, 1958.

Braudel, Fernand. Afterthoughts on Material Civilization and Capitalism. Translated by Patricia M. Ranum. Baltimore: Johns Hopkins University Press, 1977.

Campbell, Persia. The Consumer Interest: A Study in Consumer Economics. New York: Harper, 1949.

Center, Charles C., and Heins, Richard M., eds. Insurance and Government. New York: McGraw-Hill, 1962.

Commons, John R. The Economics of Collective Action. New York: Macmillan, 1950.

Consumer Federation of America Policy Resolutions-1977. Washington, D.C.: CFA, 1977.

Cox, Edward F.; Fellmeth, Robert C.; and Schulz, John E. The Nader Report on the Federal Trade Commission. New York: Richard W. Baron Publishing, 1969.

Creighton, Lucy Black. Pretenders to the Throne: The Consumer Movement in the United States. Lexington, Massachusetts: Lexington Books, 1976.

Day, John G. U.S. Department of Transportation. Economic Regulation of Insurance in the United States. Washington, D.C.: U.S. Government Printing Office, 1970.

Dodd, Edwin Merrick. American Business Corporations Until 1860. Cambridge, Massachusetts: Harvard University Press, 1954.

Duke of Yorke's Book of Laws, 1676-1682. Harrisburg, Pennsylvania: Lane S. Hart, State Printer, 1879.

Elbrecht, Richard A., ed. Consumer Viewpoints: Critique of the Uniform Consumer Credit Code. Berkeley, California: Consumer Research Foundation, 1969.

Furubotn, Eirik G. and Pejovich, Svetozar, eds. The Economics of Property Rights. Cambridge, Massachusetts: Ballinger Publishing, 1974.

Galbraith, John Kenneth. Economics and the Public Purpose. New York: Houghton Mifflin, 1973.

Glaeser, Martin G. Public Utilities in American Capitalism. New York: Macmillan, 1957.

Guide to Consumer Services. Mount Vernon, New York: Consumers Union of United States, 1977.

Hale, Lord Matthew. History of the Common Law England. Edited by Charles McGray. Chicago: University of Chicago Press, 1971.

Haring, Joseph E. Urban and Regional Economics: Perspectives for Public Action. Boston: Houghton Mifflin, 1972.

Henderson, Hazel. Creating Alternative Futures: The End of Economics. New York: Berkeley Windhover, Berkeley Publishing Corporation, 1978.

Hughes, Jonathan R. T. The Governmental Habit: Economic Controls from Colonial Times to the Present. New York: Basic Books, 1977.

Judd, Leda R. and McEwen, Robert J. A Handbook for Consumer Participation in Health Care Planning. Chicago, Illinois: Blue Cross Association, 1977.

List of Publications. Chicago: National Conference of Commissioners on Uniform State Laws, 1977-1978.

Means, Gardiner C. Pricing Power and the Public Interest. New York: Harper, 1962.

Morganstern, Stanley. Legal Regulation of Consumer Credit. Dobbs Ferry, New York: Oceana Publications, 1972.

Mueller, Willard F. A Primer on Monopoly and Competition. New York: Random House, 1970.

National Housing and Economic Development Law Project. Handbook on Housing Law Landlord-Tenant Materials. Berkeley, California: University of California, 1973.

Nelson, Helen E., ed. Consumers Organize for Health Care: Consumer Sponsored Group Practice Health Care Plans. Milwaukee, Wisconsin: Center for Consumer Affairs, University of Wisconsin-Extension.

Nelson, Helen E.; Allen, Liz; and McNally, Kit. U.S. Department of Health, Education, and Welfare. A Guide to Consumer Action (HEW Publication No. (OE) 77-15800). Washington, D.C.: HEW, 1978.

Nulty, Leslie Ellen. Understanding the New Inflation: The Importance of the Basic Necessities. Washington, D.C.: Exploratory Project for Economic Alternatives, 1977.

Office of Technology Assessment Health Program Plan—Fiscal Year 1978 (November 4, 1977).

Office of Technology Assessment, U.S. Congress. Perspectives on Federal Retail Food Grading. Washington, D.C.: U.S. Government Printing Office, 1977.

Public Interest Perspectives: The Next Four Years. Washington, D.C.: Public Citizen, 1977.

Proceedings of the Second National Seminar for Consumer Representatives In State and Local Government. Milwaukee, Wisconsin: Center for Consumer Affairs, University of Wisconsin-Extension, 1974.

Scitovsky, Tibor. The Joyless Economy. New York: Oxford University Press, 1976.

Sentry Insurance. Consumerism at the Crossroads.

Shimberg, Benjamin; Esser, Barbara F.; and Kruger, Daniel H. Occupational Licensing: Practices and Policies. Washington, D.C.: Public Affairs Press, 1973.

Shuman, Samuel I., and West, Norbert D., eds. American Law: An Introductory Survey of Some Principles. Detroit: Wayne State University Press, 1971.

Sinclair, Upton. The Jungle. New York: Viking Press, 1946.

Spielmann, Peter and Zelman, Aaron. Sherlock Holmes Solves the Almost Perfect Crime—Life Insurance. Milwaukee, Wisconsin: Spielmann-Zelman Publishers, 1976.

Strumpel, Burkhard, ed. Economic Means for Human Needs: Social Indicators of Well-Being and Discontent. Ann Arbor: University of Michigan, 1976.

Tawney, R. H. The Acquisitive Society. New York: Harcourt Brace, 1920.

Titchiner, Lynne and Winyard, Anne. Consumers' Rights. London: Arrow Books, 1975.

U.S. Department of Agriculture. National Food Review. Washington, D.C.: Economics, Statistics, and Cooperatives Service, published quarterly.

U.S. Department of Health, Education, and Welfare. Directory of Federal, State, and Local Government Consumer Offices. Washington, D.C.: U.S. Government Printing Office, 1977.

U.S. Department of Health, Education, and Welfare. Directory of Federal Consumer Offices (a supplement to Consumer News). Washington, D.C.: Office of Consumer Affairs-HEW, 1977.

U.S. Department of Justice. Federal-State Regulation of the Pricing and Marketing of Insurance. Edited by Paul W. MacAvoy. Washington D.C.: American Enterprise Institute for Public Policy Research, 1977.

United States Government Manual 1977/78. Washington, D.C.: U.S. Government Printing Office, 1977.

U.S. News & World Report. What Everyone Needs to Know About Law. Washington, D.C.: U.S. News & World Report, 1976.

University of Wisconsin-Extension, Center for Consumer Affairs. Conference Report: Consumer Briefing on Net Weight Law Enforcement. Regents of the University of Wisconsin, 1975.

Veblen, Thorstein. The Theory of Business Enterprise. New York: Scribner, 1904.

Whitmore, William H. The Colonial Laws of Massachusetts. Boston: Rockwell and Churchill City Printers, 1890.

Wisconsin Directory of Licensed Occupations. Madison: Wisconsin Department of Industry, Labor and Human Relations, 1975.

Wisconsin-Center for Public Representation. A Handbook on Public Advocacy in the Administrative State. 1976.

Wisconsin Legislative Council. Legislation Relating to Occupational Licensing, Report No. 15 to the 1977 Legislature. Madison: Wisconsin Legislative Council, 1977.

Working for Consumers—A Directory of State and Local Organizations. Washington, D.C.: Consumer Federation of America.

GPO 933 039